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Hearing on

"U.S. Department of Education; Investigation of the CIO"

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Chairman Chaffetz, Ranking Member Cummings, and members of the Committee, thank you for the opportunity to appear before you today and discuss the matter regarding the Department of Education's Chief Information Officer, Danny Harris.

My name is Susan Winchell, and as the Designated Agency Ethics Official (DAEO) and Assistant General Counsel for Ethics, at the United States Department of Education (ED), I am responsible for running the Department's ethics program. Before I discuss the present matter, I would like to provide a brief overview of my background and ED's ethics program.

The ED ethics program is structured pursuant to U.S. Office of Government Ethics (OGE) regulations and guidance. The program has three basic components: financial disclosure, training, and advice and counseling. Each year we thoroughly and timely review and certify approximately 285 public financial disclosure reports and 900 confidential financial disclosure reports; provide new entrant and annual ethics training for approximately 1,300 employees; and respond to approximately 1,600 discrete requests for ethics advice. In a recent program review, the OGE highlighted a number of model practices we have instituted in the past few years to improve the ethics program, such as ensuring that all financial disclosure reports are reviewed within 5 business days; developing a detailed reviewer form to ensure a comprehensive and effective review of all financial disclosure forms; and providing tailored in-person discretionary training for offices throughout the Department upon request. Other recent improvements include establishing an Ethics Officer of the Week rotation so that all employees seeking ethics guidance receive a timely and complete response, and regularly publishing information bulletins about ethics topics for all employees. The Ethics Division has a robust intranet site with comprehensive guidance about a wide

variety of ethics topics. The Ethics Division has been recognized in the past by OGE for outstanding training.

I have worked at ED as a career attorney in the Office of the General Counsel (OGC) since 1988. I began working in the Ethics Division when it was formed in 1991. From 2003 to 2006 I served as an Associate General Counsel at OGE. When I returned to ED in 2006, I served as the Alternate Designated Agency Ethics Official and Deputy Assistant General Counsel for Ethics until 2008, when I was selected to serve in my current position.

I believe a successful and effective agency ethics program must ensure that all employees have enough information about the rules to either know how to comply with them or understand when they should be asking questions about how the rules apply to particular situations. I take this responsibility very seriously, especially with respect to ensuring that employees know when to seek counseling and who they can call if they have questions.

Involvement with OIG Investigation

I first became aware of the Office of Inspector General (OIG) investigation around February 27, 2013, when two OIG investigators came to meet with me and Phil Rosenfelt, who was serving as the acting General Counsel at that time. I was formally interviewed by the OIG investigators the next day, on February 28, 2013.

Involvement with Department Actions

In developing recommendations for the Office of the Deputy Secretary, OGC reviewed the OIG's April 2013 Report of Investigation (ROI) and concluded that the information it contained did not support a finding that any ethics rules had been violated. We also took into consideration our understanding that the activities had already ceased and that the matter had been referred to the U.S. Attorney's office for investigation.

I subsequently participated in conversations in 2013 regarding a question from the Office of the Deputy Secretary about whether it would be appropriate to reassign Dr. Harris from the OCIO position to another position. Based on the information provided in the ROI we concluded that this would be a drastic action under the circumstances, and was neither reasonable nor required.

Analysis of Issues Raised in OIG Investigation

Based on the information provided in the ROI, I concluded that although it appeared that Dr. Harris exercised poor judgment with respect to some of the conduct outlined in the ROI, he did not violate the ethics rules.

Relationships with Subordinates

According to information provided in the ROI with respect to several individuals who were Dr. Harris's subordinates at ED, outside of work Dr. Harris paid a few of these

individuals to help him with A/V installation and car detailing, and with respect to others, he agreed to provide A/V installation and car detailing in exchange for a fee. These kinds of financial relationships with individuals are not covered by the criminal conflict of interest statute, but do raise potential issues under the Standards of Ethical Conduct section on impartiality. 5 C.F.R. § 2635.502. Under this section, an employee is required to consider whether a reasonable person with knowledge of the relevant facts would question his impartiality if he works on an official assignment affecting an individual or entity with whom he has a "covered relationship" outside of work.

A relationship with an individual with whom an employee has a financial relationship, other than a routine consumer transaction, is a "covered relationship." I believe that paying subordinates outside of work and providing personal services for a fee to subordinates does create a "covered relationship" with those subordinates. However, for a recusal to be required, Dr. Harris would have to determine that a reasonable person would question his impartiality with respect to official matters that affect the subordinates involved.

Under the rules, the determination about whether a recusal is required rests with the employee first. While the ethics official can make a binding and independent determination about the necessity of a recusal, that determination may not be applied retroactively. If Dr. Harris had asked me this question ahead of time, I would have advised him that having this kind of outside relationship with a subordinate is problematic, and that, in my judgment, would cause a reasonable person with knowledge of the facts to question his impartiality in matters concerning those employees, including making assignments, recommending promotions, awarding bonuses, and conducting performance reviews. Dr. Harris has now been counseled that he may not have outside financial relationships with any subordinate because such relationships create the appearance of lack of impartiality. As a result, should Dr. Harris now repeat this conduct in the future, he would violate the Standards of Ethical Conduct, and, taking all circumstances into account, appropriate disciplinary action would be recommended. Having counseled Dr. Harris on this issue, I feel confident he understands and will not take any future actions in violation of the rule.

<u>Personal Friendship with Owner of Department Contractor</u>
With respect to his relationship with the owner of a department contractor, the ROI reflected that Dr. Harris had known the owner for 15 years, which means they first met in the late 1990's or early 2000's, and that he formed a close personal friendship with the owner five years prior to his OIG interview in 2013, which means, from Dr. Harris's point of view the close friendship formed in approximately 2008 or 2009. According to the ROI, Dr. Harris and his wife vacationed with the owner between 2010 and 2012. I am not aware of any information showing that personal funds were mingled while on vacation or that the owner gave Dr. Harris gifts while vacationing or otherwise.

The ROI concludes that Dr. Harris participated in awarding contracts to the department contractor at a time when he was close personal friends with the owner. However, in my reading of the ROI, I concluded that the information presented does not support this conclusion because it is not clear that a close personal friendship had formed at the time Dr. Harris was involved in activities relating to the owner's company.

Under the rules governing appearance of lack of impartiality, the analysis of personal friendships is similar to the analysis for financial relationships discussed above. First, friends are not among the relationships covered by the criminal conflict of interest laws at 18 U.S.C. § 208. Friends are also not a "covered relationship" under the Standards of Ethical Conduct, at 5 C.F.R. § 2635.502(a). Therefore, under this rule an employee may consider, but is not required to consider, whether a reasonable person with knowledge of the relevant facts would question his impartiality if he worked on a Department matter affecting his friend.

It is important to note that "friend" is a broad term and can describe anything from a friendly acquaintance to a more significant and enduring personal relationship. Therefore, the pattern, nature, and longevity of a friendship must be considered in determining whether a disqualification is prudent. For example, in evaluating whether an employee must disqualify himself from matters involving a friend, it is a much different case when the friendship involves a lunch or coffee a few times a year than one that involves an old family friend of long duration.

When friendships develop at or through work, there may come a time when a disqualification is advisable. However, it is not practical or necessary for employees to be disqualified from matters involving every individual they are friendly with. While the ROI establishes that Dr. Harris and the owner knew each other as far back as 1998 or 1999, it does not provide information that illustrates a close friendship, the nature of which would make a disqualification advisable, until 2010 when the Harris's and the owner vacationed together. The ROI indicates that Dr. Harris was involved in activities relating to the department contractor through 2006, when he served as a program manager for a contract awarded that year. Dr. Harris did determine at some point that the nature of the friendship had become close enough for him to notify his staff that he was disqualified from matters involving the department contractor.

It is important to note that even if an employee participates in a matter involving a personal friend where the nature of the relationship makes it prudent to disqualify, as noted above, while the ethics official may make an independent and binding determination about whether an appearance of impartiality exists in a specific set of circumstances, the rule is specifically designed to place this judgment in the first instance with the employee. This means that if an employee works on a matter involving a friend, he has not violated the rule until and unless his supervisor or the ethics official makes a different determination and he proceeds to work on the problematic matters anyway. As OGE has stated, "2635.502 reflects OGE's concern that

an employee not be placed in the position of being disciplined under the ethics rules for having failed to identify every imaginable appearance issue or for having improperly surmised the expectations of the "reasonable person." OGE Informal Advisory Opinion 97X8 (4/22/97) (*emphasis added)*.

Income Disclosure

According to the ROI, Dr. Harris failed to report income that he received from his outside car detailing and A/V installation activities on his public financial disclosure report. He did report income in connection with A/V installation activities on his report covering 2012, and he has not reported such income in subsequent years, nor is there information showing that such income existed for those subsequent years. We generally do not require employees to amend prior reports. In our experience, employees occasionally and inadvertently omit required information. We have heightened concern only when there is reason to believe that the omission was willful or the omitted entry gives rise to conflict of interest concerns. The ROI does not contain information supporting a conclusion that Dr. Harris's omissions were willful or give rise to a conflict of interest.

Inquiry about Work Opportunities for a Relative

The ROI states that Dr. Harris advocated for a relative to be hired at ED. From an ethics perspective I reviewed the information provided in the ROI to determine whether Dr. Harris misused his government position in attempting to obtain employment for a relative. I concluded that he did not. Based on the information in the ROI I concluded that Dr. Harris inquired about possible employment that would be appropriate for his relative. There is no information showing that he participated in, or attempted to influence, the hiring process. In my view a simple inquiry about job openings that might be suitable for a relative is not, without more, misuse of position under the Standards of Ethical Conduct.

Misuse of Department Equipment

Finally, I reviewed the allegation that Dr. Harris misused Department equipment and resources by using ED email and other computer equipment and software in connection with his outside activities. However, the ROI did not clearly establish whether the outside activities were a business or a hobby for this purpose. If the activities were a business, personal use of government equipment is prohibited. However, if they were a hobby, the Department's personal use policy permits de minimis personal use of such equipment.

Ethics Counseling of Dr. Harris

On February 20, 2014, I contacted Dr. Harris by email about setting up a time to meet and discuss ethics rules. This meeting would fulfill his annual ethics training requirement and also provide an opportunity to conduct in-person counseling on the issues raised in the OIG's report. This meeting took place on March 21, 2014.

Prior to that meeting, Dr. Harris requested guidance on how to handle friendships in the workplace. Given the timing of this request, I believe it reflected the fact that Dr. Harris was sensitized to issues relating to friendships in the workplace by the OIG investigation and his subsequent counseling.

Thereafter, I met with Dr. Harris in his office on March 21, 2014. I reviewed the ethics laws and rules regarding conflict of interest and appearance of lack of impartiality. This discussion focused, to a large extent, on how to handle friends in the workplace and appearance issues that arise when supervisors and subordinates have financial relationships outside of work. I also discussed gifts between employees and misuse of government equipment.

During our conversation, Dr. Harris appeared to understand the issues, and how, with the benefit of hindsight, the conduct under review was likely to raise the appearance that his official actions affecting friends and subordinates with whom he has personal and financial relationships outside of work are not impartial. He also appreciated the fact that the personal use of government equipment is prohibited in connection with personal business activities. I also learned in this discussion that his friendship with the owner ended at the time the OIG initiated interviews in connection with their investigation, and Dr. Harris no longer performed any A/V installation activities involving his ED subordinates. This was consistent with OGC's understanding that Dr. Harris no longer conducted home theater installations. Dr. Harris indicated to me that he fully understood what he needed to do in the future to avoid similar questions and issues about his conduct. I felt that his representations in this regard were sincere and credible.

Ultimately, had Dr. Harris consulted me on the above activities prior to engaging in them, I would likely have advised that he not engage in the activities because they may give the appearance of lack of impartiality. My understanding is that the U.S. Attorney's office has declined to prosecute Dr. Harris and closed their investigation. Having counseled Dr. Harris on this matter, both in person and in writing, I believe that the activities cited were temporary lapses in judgment in the long career of a public servant. I also believe the Department handled the matter responsibly given the circumstances.

Chairman Chaffetz, Ranking Member Cummings, and members of the Committee, this concludes my statement. I am happy to answer any questions you may have.