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Source of document:	FOIA Request Supervisory Government Information Specialist Office of the Inspector General Office of General Counsel 950 Pennsylvania Ave., NW Room 4726 Washington, DC 20530 Voice: 202-616-0646 Fax: 202-616-1212 Email: oigfoia@usdoj.gov

May 9, 2024

Subject: Freedom of Information/Privacy Act Request [22-OIG-092]

This is in response to your Freedom of Information Act request to the Office of the Inspector General (OIG). Specifically, your request seeks the report related to the Investigative Summary entitled: "Findings of Misconduct by a then U.S. Attorney for Having an Intimate Relationship with a Subordinate."

The responsive report, consisting of 16 pages, has been reviewed. It has been determined that certain portions of such report be excised pursuant to the Freedom of Information Act, 5 U.S.C. §552(b)(6) and (7)(C), as follows:

- 5 U.S.C. § 552(b)(6), protects personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and
- 5 U.S.C. § 552(b)(7)(C), protects records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Please be advised that the OIG considered the foreseeable harm standard of the FOIA Improvement Act of 2016 when reviewing the responsive records and applying the appropriate FOIA exemptions. Consequently, please find enclosed that information which can be released pursuant to your request. We consider this response as closing your request with the OIG.

If you are not satisfied with OIG's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552 (2012 & Supp. V 2017). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison, Deborah Waller, at (202) 616-0646 for any further assistance with your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll free at 1-877-684-6448.

Sincerely,

Deborah M. Waller

Deborah M. Waller
Supervisory Government Information Specialist
Office of General Counsel

Enclosure

An Investigation of Alleged Misconduct by U.S. Attorney Duane Kees

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NOVEMBER 2021

NOT FOR PUBLIC RELEASE

I. Introduction

On December 4, 2019, the Office of the Inspector General (OIG) received a referral from the Executive Office for U.S. Attorneys (EOUSA) based on information that then U.S. Attorney (U.S. Attorney) for the Western District of Arkansas (WDAR) Duane "Dak" Kees had sent inappropriate text messages to [redacted]

According to the referral, EOUSA learned of the text messages when preparing a proposed removal for [redacted] in the WDAR. While the proposed removal was being prepared, [redacted] mentioned the existence of the text messages to Kees when trying to convince him not to take any disciplinary action against [redacted] As a result, according to the referral, Kees was "very indecisive about what to do." Kees ultimately decided to support the proposed removal, and on [redacted] communicated this decision to [redacted] However, Kees also informed [redacted] that [redacted] "had something they could hold over his head" and that "he felt he shared too much office personnel information with [redacted] when she was [redacted]" Two days later, on the evening of [redacted] learned that [redacted] had recently told a former WDAR employee that she had text messages from Kees that would be "damaging and embarrassing to Kees" and that Kees had sent her a text message [redacted] The next morning, [redacted] notified EOUSA of this information, and EOUSA referred the matter to the OIG the same day.

This report summarizes the OIG's investigation into the allegations that Kees behaved inappropriately toward a subordinate employee. Our investigation included reviewing relevant documents, emails, and text messages. We interviewed Kees, [redacted] and three other current or former employees of the WDAR U.S. Attorney's Office (USAO) as well as former Associate Deputy Attorney General Scott Schools, [redacted] and [redacted]

We found that former U.S. Attorney Kees entered into an intimate relationship with [redacted] within a few months of his arrival as the U.S. Attorney in January 2018 and that the intimate relationship lasted until September 2018. We concluded that Kees committed misconduct by engaging in an intimate relationship with a subordinate despite being warned by Department of Justice (Department or DOJ) leadership at his U.S. Attorney orientation that the Department would not tolerate such relationships.[1] We also found that while Kees was engaged in the

[1] As discussed below, EOUSA issued a policy in November 2018 governing romantic or intimate relationships between supervisors and their subordinates. The policy applies to U.S. Attorneys. However, Kees (Cont'd.)

improper relationship, he supervised [redacted] and participated in pay, performance, and reassignment decisions affecting [redacted] We concluded that Kees should have been concerned that a reasonable person with knowledge of the relevant facts would question his impartiality in those decisions and should, therefore, have disclosed the potential appearance problem to a Department ethics official and received authorization before participating in employment actions concerning [redacted] His failure to do so constituted poor judgment.

Unless otherwise noted, the OIG applies the preponderance of the evidence standard in determining whether DOJ personnel have committed misconduct. The Merit Systems Protection Board applies this same standard when reviewing a federal agency's decision to take adverse action against an employee based on such misconduct. *See* 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1)(ii).

We have provided a copy of our report to EOUSA, the Office of the Deputy Attorney General, and the Office of Professional Responsibility.

II. Applicable Standards

A. Deputy Attorney General Instruction Regarding Relationships between U.S. Attorneys and Subordinates

As noted above, Kees's intimate relationship with [redacted] ended in late September 2018, several weeks before EOUSA issued its November 2018 *Policy on Notification of Romantic or Intimate Relationships*. Prior to this time, the Department did not have a policy governing romantic or intimate relationships between supervisors and subordinates. However, according to former Associate Deputy Attorney General (ADAG) Scott Schools, then Deputy Attorney General Rod Rosenstein gave him a "clear instruction" to inform incoming U.S. Attorneys that the administration would not tolerate romantic or sexual relationships between U.S. Attorneys and subordinates.[2] Schools said that his message at U.S. Attorney orientations was "clear" that "this administration [will] not tolerate you doing that." Schools said that he conveyed that relationships between U.S. Attorneys and subordinates inflict long-term damage on the office and create significant problems.[3]

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and [redacted] ended their intimate relationship before the policy took effect. Prior to November 2018, EOUSA did not have a policy governing such relationships.

[2] Rosenstein became the Deputy Attorney General in April 2017. Prior to Schools becoming ADAG in October 2016, David Margolis served as ADAG for several decades. Margolis informed U.S. Attorneys at orientation that a relationship with a subordinate would be a "capital offense."

[3] The Merit Systems Protection Board has consistently held that an employee's failure to follow a supervisor's instructions can support an agency's misconduct charge. *See Blevins* v. *Dep't of the Army*, 26 M.S.P.R. 101, 104 (1985) ("Failure to follow instructions...affects the agency's ability to carry out its mission."); (Cont'd.)

Although EOUSA's relationships policy was not in place at the time that Kees engaged in an intimate relationship with [redacted] we describe the policy briefly below because it emphasizes that romantic or intimate relationships between supervisors/managers and subordinate employees "have the potential to create significant disruption in the workplace" and states that a U.S. Attorney having a romantic or intimate relationship with a subordinate has a "severe impact" on the USAO. According to [redacted] the EOUSA policy reflects the same concerns that caused ADAG Schools and ADAG Margolis to instruct incoming U.S. Attorneys not to have relationships with subordinates. As discussed further below, we found that Kees's relationship with [redacted] negatively affected his relationship with his [redacted] when Kees's disciplinary decision regarding [redacted] was driven by his desire to prevent the disclosure of his relationship with [redacted] instead of the best interests of the USAO.

EOUSA's relationships policy applies to all EOUSA and USAO employees, including U.S. Attorneys.[4] The policy does not prohibit romantic or intimate relationships between supervisors and subordinates and instead requires the supervisor and the subordinate to notify the appropriate supervisor or manager so that measures, such as reassignments or recusals, can be taken to ensure that the relationship does not have an adverse impact on the Department's operations or the particular office.[5] The policy identifies numerous potential problems associated with these kinds of relationships, including favoritism, conflicts of interest, loss of objectivity, abuse of authority, or sexual harassment.[6]

With respect to U.S. Attorneys, the policy requires U.S. Attorneys to notify the EOUSA Director and an ADAG when the U.S. Attorney "realizes that they are about to enter

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see also Parbs v. *U.S. Postal Serv.*, 107 M.S.P.R. 559, 564-66 (2007); *Hamilton* v. *U.S. Postal Serv.*, 71 M.S.P.R. 547, 555-556 (1996). "To prove a charge of failure to follow instructions, an agency must establish that the employee: (1) was given proper instructions, and (2) failed to follow the instructions, without regard to whether the failure was intentional or unintentional." *Powell* v. *U.S. Postal Serv.*, 122 M.S.P.R. 60, 63-64 (2014).

[4] "Romantic or intimate relationships" are defined as "those relationships that go beyond professional or collegial interaction" and the term is "intended to cover particularly close interpersonal relationships characterized by dating, romantic or passionate involvement, or sexual activity." The policy also includes a section governing AUSA romantic or intimate relationships with witnesses and law enforcement agents, witnesses, and defendants.

[5] The OIG acknowledges that current EOUSA policy places an equal obligation to report a romantic or intimate relationship on both supervisors and subordinates. The OIG, however, does not name subordinates as subjects in investigations of this nature, and we do not make findings of misconduct against the subordinates solely for failure to report a romantic or intimate relationship. *See* OIG Management Advisory Memorandum of Concerns Identified in the Handling of Supervisor-Subordinate Relationships Across DOJ Components (March 10, 2020), p. 4.

[6] Harassment on the basis of sex violates Section 703 of Title VII of the Civil Rights Act, 29 C.F.R. § 1604.11. The Department has a zero tolerance policy with respect to harassment, including sexual harassment. *See* Deputy Attorney General Rod J. Rosenstein *Memorandum for Heads of Department Components, Sexual Harassment and Sexual Misconduct,* April 30, 2018 *citing* DOJ Order 1200.2 and https://www.justice.gov/jmd/eeos/sexual-harassment.

into a romantic or intimate relationship with a subordinate employee." Although the policy does not prohibit romantic or intimate relationships between U.S. Attorneys and subordinates, the policy states that recusal of the U.S. Attorney is "not practicable" and that "the operations of the entire office will almost certainly be affected" by such a relationship; that such a relationship "greatly increases" the potential for subordinates to file complaints of favoritism, conflicts of interest, loss of objectivity, abuse of authority, or sexual harassment against the U.S. Attorney; and that a U.S. Attorney who is "engaged in a romantic or intimate relationship with a subordinate employee may be subject to disciplinary or other action by the Deputy Attorney General."

B. Standards of Conduct

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), promulgated by the Office of Government Ethics (OGE) and found at 5 C.F.R. Part 2635, do not explicitly address romantic or intimate relationships between supervisors and subordinates. However, the Standards of Conduct address an employee's performance of his official duties in a matter where his impartiality could be questioned. Two regulations, § 2635.502(a)(2) and 2635.702(d), are relevant here.

Section 2635.502(a) states:

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is...a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the [designated agency ethics official] of the appearance problem and received authorization from the [designated agency ethics official]....

5 C.F.R. § 2635.502(a). The definition of "covered relationship" includes a household member or close relative but does not include unmarried romantic partners or friends not sharing a household. *See* 5 C.F.R. § 2635.502(b).

However, Section 2635.502(a)(2) contains a broader "catch-all" provision that states: "An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter."[7] 5 C.F.R. § 2635.502(a)(2). For example, where the unique

[7] The phrase "a particular matter" found in the catch-all subsection of the regulation has a broader meaning than the phrase "a particular matter involving specific parties" found in subsection (a). "Particular matter" is defined at 5 C.F.R. § 2640.103(a)(1) and includes "only matters that involve deliberation, decision, or (Cont'd.)

circumstances of "a personal friendship...or other association not specifically treated as a covered relationship" raise an appearance question, the employee may elect to use the Section 502 process. OGE 99 x 8, Memorandum to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, April 26, 1999 at 2. The OGE has made clear that employees whose circumstances fall within the "catch all" provision of Section 502 are "encouraged" to use the process provided by § 502(a)(2), but that "[t]he election not to use that process should not be characterized...as an 'ethical lapse.'" OGE 94 x 10(1), Letter to a Departmental Acting Secretary, March 30, 1994; *see also*, OGE 01 x 8 Letter to a Designated Agency Ethics Official, August 23, 2001.

Similarly, Section 263S.702(d), which is labeled "Performance of official duties affecting a private interest," states: "To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend...with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of § 2635.502." 5 C.F.R. § 2635.702(d).

Thus, read together, these regulations provide that where a federal employee is concerned that the performance of his duties would affect the financial or other interests of a friend, and the circumstances would cause a reasonable person to question the employee's impartiality in the matter, the employee should not participate in the matter without disclosing the appearance problem and obtaining authorization from the designated agency ethics official.

The General Counsel for EOUSA is the EOUSA's Deputy Designated Agency Ethics Official (designated ethics official) for U.S. Attorneys and as such is the individual who provides guidance to U.S. Attorneys regarding their ethical obligations to the Department. *See* 5 C.F.R. § 2635.107.

III. Factual Findings

A. Background

The U.S. Attorney's Office (USAO) for the Western District of Arkansas (WDAR) has approximately 44 employees stationed in 4 offices in the cities of: Fort Smith, Fayetteville, Hot Springs, and Texarkana. The headquarters office is in Fort Smith, where the U.S. Attorney is stationed.

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action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1). (Emphasis added). Particular matters may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." *Van Ee* v. *Envt'l Prot. Agency*, 202 F.3d 296, 302 (D.C. Cir. 2000).

Duane "Dak" Kees served as the U.S. Attorney for the WDAR from January 5, 2018, through his resignation on January 17, 2020. Prior to becoming U.S. Attorney, Kees worked in the private sector and had no previous experience in a USAO.

(b)(5); (b)(7)(C)

B. Kees Attends U.S. Attorney Orientation in January 2018

According to (b)(5); (b)(7)(C) Kees attended an orientation for new U.S. Attorneys in Washington, DC, from January 28 to February 1, 2018. As previously discussed, at that orientation on January 30, then ADAG Schools gave a 30-minute presentation on "Professionalism," in which he specifically informed the new U.S. Attorneys that relationships with subordinates would not be tolerated.

C. USAO Management Asks (b)(6); (b)(7)(C) Kees Prior to His Arrival

In preparing for the January 2018 arrival of U.S. Attorney Kees, (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) and then (b)(6); (b)(7)(C) asked (b)(6); (b)(7)(C) Kees while maintaining her responsibilities as (b)(6); (b)(7)(C) until Kees selected (b)(6); (b)(7)(C) as the position is titled.[8] (b)(6); (b)(7)(C) said that she had never previously served as (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) Kees (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) However, Kees did not immediately hire (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) continued (b)(6); (b)(7)(C) Kees.[9]

(b)(5); (b)(7)(C)

[8] At the time, (b)(6); (b)(7)(C) Kees named him as the (b)(6); (b)(7)(C)

[9] According to (b)(5); (b)(7)(C) he anticipated that Kees would (b)(5); (b)(7)(C) as permitted under Department rules, such as (b)(5); (b)(7)(C)

[redacted]

D. Kees and [redacted] Admit to Intimate Relationship

Both Kees and [redacted] admitted to the OIG that they engaged in an intimate relationship. They told us that they became fast friends shortly after [redacted] became [redacted] Kees said they started flirting and then began to have "inappropriate conversations," trading stories of their (and others') sexual experiences. According to Kees, the inappropriate story telling began in the first 4 to 6 weeks of his joining the office (early to mid-February 2018). [redacted] said that she initially resisted telling her personal stories but that Kees said that she had to because he was "the lead law enforcement officer" in the area. Kees said that he did not make such a comment.

Both Kees and [redacted] said that by early May 2018, the flirting had led to kissing and, on occasion, additional sexual touching in the office or elevator at the end of the day. [redacted] said that she let Kees kiss her because Kees was a friend, and she did not want to hurt his feelings. [redacted] said Kees "asked" for a kiss every other week until she stopped kissing him around late September 2018. According to [redacted] the kissing would often occur at the end of the day when Kees would close the blinds in his office and would stand in the doorway and invite her in. Kees said that, to the best of his recollection, they kissed three to four times while he was the U.S. Attorney. Both said that the other initiated the sexual touching.

We asked [redacted] if she felt that maintaining her position as [redacted] was dependent on acquiescing to Kees's conduct. She said that as the U.S. Attorney, Kees could remove her any time he wanted, and that her [redacted] was dependent on Kees [redacted]. According to [redacted] if she refused to kiss him, it would have ruined their friendship and "hurt his feelings." However, [redacted] also stated that with respect to his invitations to kiss him, "I turned him down more than I accepted." [redacted] said that she thinks that if she had asked him to stop asking to kiss her, he would have. [redacted] told the OIG that Kees was clear that he was not looking for a relationship outside the workplace.

Both [redacted] and Kees acknowledged that they had greater intimate physical contact when they traveled separately to [redacted] for work and stayed at the same hotel for 1 night, which we determined was [redacted] told the OIG that she went to [redacted] Kees told the OIG that he spent the night in [redacted] as part of a road trip with the [redacted] that consisted of going to [redacted] between [redacted] Kees stated that on the return trip the next day, he and [redacted] stopped at [redacted] that they had not visited the day before. Kees stated that he was not aware [redacted] would also be in

[redacted] when he decided to make the trip and only found out about her travel either the day of or the day before he departed for the road trip.

On the evening of [redacted] met for dinner. Later that evening, Kees and [redacted] met in [redacted] hotel room where they engaged in sexual contact. Kees and [redacted] have different recollections of the extent of their sexual contact, but both acknowledged to the OIG that sexual activity occurred.

Kees and [redacted] also told the OIG that they communicated by text message the night they stayed at the [redacted] hotel. These text messages were the text messages referenced in the EOUSA referral to the OIG. [redacted] told the OIG that she no longer had the text messages because she had deleted them the following day. When asked about the content of the text messages, [redacted] told the OIG that she knew Kees was coming to her room because of their texts and that she thought that he [redacted] and she said sure. [redacted] told the OIG that she deleted the texts because she did not want Kees "to get in trouble" and that she could not recall whether she texted Kees on her government or personal cell phone.[10]

Kees told the OIG that he did not recall who initiated their meeting in [redacted] hotel room or whether they communicated about meeting up by phone or text, but that they "started communicating" and that is how he "end[ed] up knowing" her room number. Kees told the OIG that any texts were on his personal cell phone.[11]

E. [redacted] Selected as [redacted]

In or around [redacted] according to [redacted] she worked with [redacted] to post the U.S. Attorney's [redacted] position after [redacted]

[10] As discussed below, [redacted] told a former WDAR employee that she retained those text messages, and the former employee relayed that information to [redacted] shortly after [redacted] resulting in the referral to the OIG.

[11] The Department does not require EOUSA to retain text messages sent to or from government-issued devices. However, we obtained [redacted] and Kees's government-issued phones. We were unable to conduct a forensic examination of Kees's government-issued phone because, after Kees resigned and consistent with past practice in the WDAR, his government-issued device was "unenrolled" from EOUSA's mobile device management system, and therefore the device was no longer available for remote password reset. The OIG conducted a forensic analysis of [redacted] government-issued phone. Although there were numerous text messages on her phone, including messages with Kees, the text message exchange between Kees and [redacted] described by [redacted] was not on her phone, nor was there evidence that any messages between Kees and [redacted] on [redacted] had been deleted. The messages we reviewed between [redacted] and Kees did not contain any sexually explicit or otherwise inappropriate content.

[redacted] said she applied for the position after Kees asked her to stay on [redacted] According to the WDAR [redacted] by that time, [redacted] The WDAR [redacted] described Kees as not having much of a role in the selection process. She stated that after her interview, Kees said, "'She seems like a good fit.'" According to the WDAR [redacted] "[E]verybody else agreed and we just gave her that promotion and slid her in the slot and she did good." [redacted]

F. Kees and [redacted] Continue Having Intimate Contact Until [redacted]

Both Kees and [redacted] told the OIG that upon their return to [redacted] they continued their [redacted] flirting and kissing in the office and elevator over the summer of 2018, but that [redacted] interest waned over time. Kees said that the relationship gradually changed after [redacted]: "I continued to flirt and tried to be funny with her, but didn't get the same response." [redacted]

[redacted] told the OIG that by September 2018, [redacted] and was no longer interested in flirting with or kissing Kees. However, she said that she did not want to upset Kees, so she continued to kiss him on the occasions when she felt she could not avoid him.

[redacted] told us that in [redacted] she was riding down the elevator with Kees, and he asked her to kiss him. According to [redacted] when she declined, Kees laughed and said, "You do know I'm in charge of your promotions, right?" [redacted] said Kees's comment about promotions was a "punch-in-the-gut" and that she stopped flirting and was "more professional" going forward. Kees said that he did not recall making the comment about promotions and that he hoped that he would not have made such a comment.

[redacted] told the OIG that their intimate contact ended shortly after the elevator incident in late September 2018. Both stated that their intimate contact ended when [redacted] told Kees [redacted] and no longer had time for Kees. Although [redacted] told Kees that the reason for ending their intimate contact was [redacted] told us that she ended their intimate contact and no longer wanted to "give in" to Kees because of [redacted]

[redacted] stated that towards the end, she felt great "anxiety" when Kees asked for intimate contact. She said that she knew Kees was going to call her into his office for a kiss when she heard him lowering his metal window blinds and that the sound of the metal blinds lowering filled her with anxiety.

Kees acknowledged that engaging in an intimate relationship with [redacted] his subordinate, was "wrong" and that he did not report his intimate relationship with [redacted] to anyone. [redacted] and he confirmed that Kees did not inform him about his (Kees's) relationship with [redacted] and did not seek related ethics advice.

G. Kees Approves [redacted] Reassignment to [redacted] Position

After [redacted] and Kees ended their intimate contact in late September 2018, [redacted] retained [redacted] as [redacted] In [redacted] however, [redacted] decided to return [redacted] full-time to [redacted] position [redacted]

According to [redacted] initiated this decision, not Kees, nor did Kees suggest that [redacted] be reassigned. [redacted] told us that at the time of this decision, he was not aware that Kees and [redacted] had previously been in an intimate relationship.[12] Kees also told us that [redacted] reassignment was [redacted] decision but that he approved it.

Although [redacted] initially emailed [redacted] in [redacted] stating that her reassignment was effective immediately, [redacted] did not transfer back to her full time [redacted] position until [redacted][13] We were unable to determine why this delay occurred. [redacted] said that after receiving [redacted] email informing her of her transfer, she spoke with Kees and "threw a fit" at the prospect of losing her pay increase and that Kees then allowed her to remain in the position [redacted] until she was ultimately transferred [redacted] Kees said he did not recall delaying [redacted] return to [redacted] position once [redacted] made the decision, but that he recalled [redacted] complained to him about the loss of pay. [redacted] told the OIG that he could not recall why his [redacted] decision to move [redacted] was delayed 5 months, although he told

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12 [redacted]

13 [redacted]

the OIG that he recalled that [redacted] was concerned about the loss of pay that would result from the transfer.

H. Kees Hesitates Terminating [redacted] Because of Concerns that His Past Relationship with [redacted] Would be Reported

As noted above, EOUSA became aware of potentially inappropriate text messages between Kees and [redacted] in [redacted] when EOUSA was in contact with [redacted] about the proposed removal of [redacted]

[redacted] told the OIG that in [redacted] he reported to EOUSA an incident involving [redacted] and EOUSA informed [redacted] that [redacted] should be terminated due to numerous prior instances of misconduct. According to [redacted] it was "obvious" that [redacted] needed to be removed. He said, however, Kees was "torn" and "didn't feel that [termination] was a hundred percent the right course of action." According to [redacted] at one point, Kees argued for a 2-week suspension without pay and objected to the termination. [redacted] said that in the past Kees had always accepted EOUSA's disciplinary recommendations, so he did not understand Kees's reluctance on this occasion. [redacted] said that Kees's stance on the termination created "extreme tension" in their relationship and that they went from talking several times a day to almost none.

Kees said that he advocated for a 2-week suspension instead of a termination for [redacted] because he was concerned that [redacted] would "leverage" Kees's prior relationship with [redacted] against him, meaning [redacted] and/or [redacted] would report Kees's relationship with [redacted] to the OIG if Kees terminated [redacted]. Kees stated that he thought if he did not terminate [redacted] his relationship with [redacted] might not be revealed, allowing him to remain U.S. Attorney. According to Kees, he met separately with both [redacted] and [redacted] to discuss the disciplinary matter and both alluded to his past relationship with [redacted] in their efforts to convince Kees not to terminate [redacted]. Kees stated that neither raised an "explicit quid pro quo" by directly threatening to expose Kees's past relationship with [redacted] as leverage to prevent Kees from terminating [redacted] but that "in [his] soul", he believed that he "interpreted both [redacted] comments correctly" as a threat to do so.[14]

[14] [redacted] told the OIG that while she did not want anyone to find out about her past relationship with Kees, she alluded to it when she confronted Kees because [redacted] thought [redacted] Kees [redacted] also told the OIG that [redacted] believed that Kees would not fire him because Kees would be too afraid that [redacted] would reveal her past relationship with Kees.

According to Kees, [redacted] he decided that he would agree to terminate [redacted][15] Kees told the OIG that his conversations with [redacted] about [redacted] made him realize that she thought she had "veto power" over his personnel decisions, and he began to "put out feelers" for a new job. With respect to the termination decision, he said that he knew there would eventually be another incident with [redacted] that would harm the office and that termination was appropriate. Kees also said that he was concerned that EOUSA was going to go over his head and raise the issue of [redacted] termination with the Office of the Deputy Attorney General.[16]

[redacted] said he was relieved when Kees called him on [redacted] and agreed to [redacted] termination. He said that "out of the blue" Kees mentioned that he may have "talked to [redacted] too much" about personnel issues. [redacted] stated that Kees's comments did not concern [redacted] at the time because he did not understand what Kees was referencing. [redacted]

[redacted] told the OIG that on December 3, [redacted] informed him that a former employee spoke with [redacted] the evening before, and [redacted] told the former employee that she had text messages from Kees during a travel assignment in which Kees [redacted] According to the former employee, [redacted] called her to discuss whether [redacted] and said that Kees may be [redacted] Kees's [redacted]. The former employee said that [redacted] also intimated that [redacted] might use the texts if he were terminated. On December 4, [redacted] reported this information to EOUSA, and EOUSA immediately reported this information to the OIG. [redacted] also informed Kees about the referral to EOUSA and told him that the OIG could potentially open an investigation. According to Kees, he told [redacted] that he (Kees) would not live in fear of "blackmail" and the only way he might be able to "survive this" (retain his job as U.S. Attorney) would be if [redacted] handled the matter "by the book." [redacted] also told the OIG that he was unaware of the intimate relationship between Kees and [redacted] until our interview and that he finally understood that Kees resisted terminating [redacted] because of the threat of having his relationship with [redacted] exposed.

According to Kees, a short time after his conversation with [redacted] about the misconduct allegations, he decided to resign. On January 3, 2020, Kees informed [redacted] of his decision to resign effective January 17, and on January 6, Kees informed the office

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15 [redacted] told the OIG that he telephoned Kees and told him to stop speaking about the [redacted] matter with USAO staff. In addition, [redacted] estimated that Kees's failure to acquiesce to the [redacted] removal independently prolonged the disciplinary process an additional 2 to 3 weeks.

16 [redacted] confirmed that he told Kees that he strongly recommended terminating [redacted] and that, if necessary, he would remove the disciplinary decision from the USAO.

that he would be resigning. On January 8, the OIG contacted Kees requesting an interview, and he was interviewed on January 16. Kees's last day in the office was January 17, 2020.

I. Kees's Approval of [redacted] Performance Appraisals and Incentive Awards

[redacted] told the OIG that performance appraisals and incentive awards for the entire office were discussed and decided as a group by the USAO management team, including Kees. [redacted] told the OIG that he had no recollection that Kees ever intervened to enhance or reduce a performance appraisal or incentive award for [redacted] or any other USAO personnel.

In May 2018, around the time Kees began having an intimate relationship with [redacted] Kees signed as the approving official [redacted] incentive award of $2,000 for work performed in the previous calendar year.[17] Two other [redacted] received a higher incentive award than [redacted], and three received the same amount.

The following year, in [redacted] Kees, as the head of the office, approved [redacted] performance appraisal, but he was not the rating or reviewing official. [redacted] rating was Outstanding. [redacted] performance appraisal that was approved by Kees in the [redacted] was for work performed between [redacted] During most of that year, [redacted] worked as [redacted] and, for approximately 7 months during this time, Kees was engaged in an intimate relationship with [redacted][18]

In [redacted] Kees signed as the approving official on a $1,000 incentive award and a 3-day time off award for [redacted]. At the time Kees signed her incentive awards as the approving official, Kees had approved [redacted] decision to reassign [redacted] back to her [redacted] position but that decision had not yet been implemented. [redacted] received a lower cash incentive award than any of the other 13 [redacted] who received a cash award, including the two others who also received time-off awards.

IV. Analysis

We found that Kees became involved in an intimate relationship with his subordinate, [redacted] within a few months of being sworn in as the U.S. Attorney on January 5, 2018, and that the relationship lasted through late September 2018

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[17] The performance year for USAOs is the calendar year. Thus, [redacted] performance appraisal period ended on [redacted] shortly before Kees arrived. [redacted] rating was Outstanding. It is unclear whether Kees participated in the management team's performance appraisal discussion for the [redacted] performance appraisals. Even assuming Kees participated in this discussion, it would have occurred before Kees was engaging in intimate behavior with [redacted] which began in May 2018.

[18] Kees resigned in January 2020 before the performance appraisals for [redacted] were finalized.

(approximately 7 months). We found that by engaging in this relationship Kees committed misconduct because he failed to follow the clear instruction given by ADAG Schools at his U.S. Attorney orientation that such relationships between U.S. Attorneys and subordinates would not be tolerated.[19]

[redacted] However, a U.S. Attorney's involvement in an intimate relationship with a subordinate attorney clearly raises questions within the meaning of 5 C.F.R. §§ 2635.502(a)(2) and 2635.702(d) about the U.S. Attorney's impartiality in supervising that employee. Section 702(d) directs employees to "comply with any applicable requirements of § 2635.502" in order to "ensure that the performance of [their] official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment." Here, the applicable provision of § 2635.502 is Section 502(a)(2), or the "catch all" provision, which encourages employees who are concerned that their participation in particular matters would raise a question about their impartiality to inform the designated agency ethics official of the appearance problem and receive authorization from that official before participating.[20]

We found that Kees participated in several employment and supervisory decisions concerning [redacted] after he was engaged in an intimate relationship with her, including the following:

Kees participated in the decision to have [redacted] remain as [redacted] when Kees decided not to hire [redacted] and then asked [redacted] to remain as [redacted] after he began an intimate relationship with her, a position that resulted in a pay increase.

Kees participated in the decision to have [redacted] removed as [redacted] when Kees approved [redacted] decision to transfer [redacted] back to her [redacted]

[19] For reasons described in footnote 11, above, we did not find sufficient evidence to conclude that Kees asked [redacted] in a text message [redacted], as alleged in the referral from EOUSA. However, the evidence is clear that Kees and [redacted] made arrangements, via text message or otherwise, to meet in her hotel room that evening.

[20] Section 502(a) is not applicable because Kees and [redacted] are not members of the same household and therefore do not have a "covered relationship" as defined by the regulation.

[redacted] position after [redacted] ended their intimate relationship, a decision which decreased her pay.

Kees participated in the USAO management team's discussions and decisions concerning [redacted] annual performance evaluations and awards. In [redacted] Kees approved [redacted] incentive award, and in [redacted] Kees approved [redacted] performance evaluation and incentive award.

We found that Kees did not inform anyone about his relationship with [redacted] including [redacted] We concluded that, pursuant to 5 C.F.R. §§ 2635.502(a)(2) and 702(d), Kees should have recognized that a relationship between a supervisor and a subordinate, particularly where the supervisor is the head of the office, could lead a reasonable person to question his impartiality in making employment decisions. For this reason, we believe that he should have consulted [redacted] disclosed the appearance problem, and received authorization before participating in any employment action concerning [redacted] His failure to disclose the relationship and seek authorization from EOUSA to participate in employment decisions concerning [redacted] constituted poor judgment.

We also note that, as articulated in EOUSA's policy on relationships between supervisors and subordinates, relationships between U.S. Attorneys and subordinates have a "severe impact" on the office and have the potential to create many problems. We found that Kees's relationship with [redacted] negatively impacted the U.S. Attorney's Office and his relationship with [redacted] when Kees placed his desire for his relationship with [redacted] to remain secret over the best interest of the USAO. Because of his concern that [redacted] would reveal their past intimate relationship and that the revelation could cost him his position as U.S. Attorney, Kees temporarily rejected a disciplinary recommendation made by EOUSA and agreed upon by his management team.[21] During the period that Kees rejected the recommended discipline, Kees's relationship and communication with [redacted] was strained and [redacted] removal was delayed, during which time [redacted] committed additional acts of misconduct.

21 [redacted]