DEPARTMENT OF VETERANS AFFAIRS
Designated Agency Ethics Official

July 16, 2018

Cameron Gore
cvgore@comcast.net

Dear Mr. Gore:

I have prepared the following in response to your request for a legal opinion regarding the application of post-Government employment restrictions to your potential post-VA employment activities. This is a follow up to our discussions of June 14-15 timeframe during which we briefly discussed the post-Government employment prohibitions, specifically the one-year cooling off period for senior employees representing anyone before their former agency, and the lifetime ban on representation in specific party matters in which you officially participated. I discuss these restrictions in greater detail below.

I am providing this advice in my official capacity as a Senior Ethics Attorney and Deputy Ethics Official of the Department of Veterans Affairs (VA), and not as your representative. Please be aware that there is no attorney-client relationship established between you and me or any other attorney in this office who assisted with this advisory letter. The information you provided to my office is not confidential, but will be disclosed on a need-to-know basis only. My advice is based on the background information you provided.

BACKGROUND

From June 2016 until May 4, 2018 you served in the VA Office of General Counsel as the Chief Counsel of the Real Property Law Group (RPLG). You led a seventeen person team providing practical, timely, and innovative legal solutions for VA's capital asset inventory nationwide - 1,240 health care facilities, including 170 medical centers and 1,061 outpatient sites of care of varying complexity. You served as the VA's preeminent legal expert for VA's billion-dollar programs in the areas of construction, real property, personal property, leasing, environmental and historic preservation, energy law and VA's enhanced use leasing (EUL) program.

You provided primary legal and transactional support to consummate approximately 70 EULs, where VA outleased underutilized and vacant properties nationwide, for selected developers to finance, construct, operate, and maintain Veteran housing, mixed use facilities, office buildings, parking garages and other improvements which generated a $377 million for the Department.

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You were the lead attorney that facilitated the ongoing revitalization of VA's 388-acre West Los Angeles campus, including the evaluation and renegotiation or termination of 28 existing land use agreements at the campus within a year's timeframe, to make the campus more Veterans focused, and to generate hundreds of thousands of dollars in revenues and in-kind consideration benefiting local Veterans. You negotiated the first EUL on the campus under the West Los Angeles Leasing Act of 2016 for a selected Lessee to provide 54 units of new supportive housing for homeless Veterans. You prepared and finalized a Letter of Intent enabling a third party to raise hundreds of millions of dollars to restore 5 historic buildings at the campus. You achieved the mutual termination of a long-standing contract with a parking operator on the campus, four years before the agreement was to expire.

You served as the lead attorney on the VA's National Leadership Council to draft crucial legislation included in the VA Mission Act of 2018 to establish an independent commission of appointed experts, to review VA's real property portfolio nationwide, solicit feedback from Veterans groups and other stakeholders and then provide recommendations to the President on how to best save hundreds of millions of dollars, by optimizing and realigning the agency's healthcare infrastructure to eliminate underutilized, vacant and obsolete capital assets and leverage non-VA-healthcare facilities in local communities.

You helped draft legislation known as the CHIP-IN Act which allows VA to enter into up to five donation agreements to receive real property and/or facilities from third parties providing care and services to Veterans. You were involved in VA executing the first of these donation agreements, in April 2017, wherein VA will receive a contribution of $34 million in private funds for a new ambulatory care facility in Omaha, Nebraska.

You provided senior level guidance with counterparts at the U.S. Army Corps of Engineers to facilitate the successful completion of VA $100+ million "super-construction projects" nationwide.

You also handled, supervised and provided expertise regarding bid protests and litigation and provided legal support on matters before the U.S. General Accountability Office (GAO); the U.S. Civilian Board of Contract Appeals and the U.S. Court of Federal Claims.

From July 2008 until June 2016 you served as the Deputy Chief Counsel for Professional Staff Group V. You led an eight-person team to support VA's real property, personal property, and EUL, medical facility leasing, and energy and environmental law and historic preservation programs.

You served as lead counsel successfully negotiating a $70 million interim bridge contract with Kiewet Turner Construction Company (KT) wherein KT agreed remobilize and resume work on VA's major construction project in Denver.

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You negotiated a Memorandum of Understanding (MOU) between VA and the City of New Orleans following Hurricane Katrina which enabled VA to acquire a 34-acre parcel of land and build a new hospital and provide state-of-the-art healthcare for local Veterans.

In serving as Deputy Chief Counsel you also handled, supervised and provided legal expertise concerning the same types of litigation matters in which you were involved as Chief Counsel.

Your involvement in the following specific party matters could trigger the post-Government employment restrictions on representational activity discussed below.

- Any EUL or Enhanced Sharing Agreement (ESA) for which:
    - You provided legal support; or
    - Was assigned to one of your subordinates during your last year of employment.

  You specified that you were involved in the Building 209 EU Lease that was executed in January 2017; the ongoing Draft EU Lease being negotiated for Buildings 205 and 208; and a contemplated EU Lease that VA plans to pursue for MacArthur Field at the West LA Campus, with a subcontractor of VA's former contractor named HoK.
- Letter of Intent enabling third party fundraising to preserve historic buildings on the West LA campus;
- The parking contract at West LA;
- The donation agreement for the Omaha Nebraska;
- Any contract in support of VA $100+ million "super-construction projects" on which you provided guidance;
- The interim bridge contract with KT;
- The MOU with the City of New Orleans;
- Any matter before the GAO; the U.S. Civilian Board of Contract Appeals or the U.S. Court of Federal Claims which:
    - You handled, supervised, or provided expertise on; or.
    - Was assigned to one your subordinates during your last year at VA

You also advised that you had the following involvement in a procurement. You assisted in drafting a solicitation seeking contractor support for VA the master planning effort at West LA. The contract was ultimately awarded to Concourse Federal Group. During your involvement in the procurement potential bidders has not been identified through and RFI, industry day or other mechanism. Your involvement ceased prior to the identification of bidders.

You had the following interaction with contractors. You worked with Concourse Federal Group concerning their support of VA's master planning effort at the West LA campus; and with Craddock Group which works with the Office of Asset Enterprise Management regarding the EUL program. However, your interaction with these

contractors pertained solely to substantive work activities supporting VA, such as strategy planning; negotiation and consummation of EUL transactions, and preparation of power points and responses and reports to Congress. Your involvement did not include any contracting officer-focused briefings, guidance or discussion that centered on the quality or performance of the contract or any compliance related issues.

You advised that you provided responses to the VA Inspector General concerning their audit of the West LA campus, which is required by the West Los Angeles Leasing Act of 2016.

Finally, I include as an attachment to this letter a spreadsheet of active EULs, leases and other agreements provided by CFM. It is my understanding that you had some personal involvement in all the EULs on this list. As to the leases and other agreements, we have no way of knowing in which you were personally involved, but include the attached list as a quick reference for you in case you are contacted about an active lease or other agreement by a future employer or entity for whom you are consulting.

In serving as your base salary exceeded $164,004 in 2018. You are therefore considered to be a "senior employee" for purposes of the post-Government Employment statute at section 207 of title 18, United States Code.

Your last day at VA was May 4, 2018. As to potential post-Government employment, you are in the preliminary stages of seeking opportunities to serve as a consultant to VA contractors such as Booz Allen Hamilton (BAH), Concourse Federal Group and The Craddock Group. You are also exploring opportunities with other private entities, including work at a law firm, although you are focused on consulting for the aforementioned VA contractors. You might also consider re-entering the Government as an attorney for another agency. You have had preliminary discussions with BAH, Concourse Federal Group and The Craddock Group. If you work for any of these companies you would serve as Consultant or Principal Consultant assisting them in the provision of expertise to VA. I note that discussions occurred with BAH, Concourse Federal Group and The Craddock Group occurred after your left VA.

You may engage in post-Government employment/consulting activities described above subject the following restrictions on certain representational activity.

DISCUSSION

CRIMINAL POST-EMPLOYMENT LAW RESTRICTIONS APPLICABLE TO SENIOR EMPLOYEES

You indicated that you meet the definition of "senior employee" for purposes of the post-Government employment restrictions. 5 C.F.R. § 2641.104. Under section 207(c)(1) of title 18, United States Code, for one year after leaving your "senior

employee" position, you may not knowingly make, with intent to influence, any communication to, or appearance before, an employee of VA if that communication or appearance is made on behalf of any other person (except the United States). This "cooling off" period is created to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position. This prohibition does not restrict representations made by you on behalf of yourself or the United States. Nor does it prohibit representation before the Congress.

In addition, because you departed VA as a senior employee, under section 207(f) of title 18, for one year after leaving your senior position, you may not knowingly, with intent to influence a decision of an employee of a department or agency of the United States in carrying out his official duties, aid or advise a foreign entity or represent a foreign entity before any department or agency of the United States.

A "foreign entity" means the "government of a foreign country" as defined in section 1(e) of the Foreign Agents Registration Act of 1938, codified at 22 U.S.C. § 611, as amended, or a "foreign political party" as defined in section 1(f) of that Act. A foreign commercial corporation will not generally be considered a "foreign entity" for purposes of section 207(f) unless it exercises the functions of a sovereign.

To "aid or advise" a foreign entity includes "behind-the-scenes" activities if done with the intent to influence a decision of an employee of a department or agency of the United States. Such activities could include drafting a proposed communication to an agency or department, or advising on an appearance before an agency or department.

Should you re-enter Federal service prior to the expiration of the senior employee ban, I note this prohibition would remain in effect until the end of the one-year cooling off period. See 5 C.F.R. 2641.204(d).

CRIMINAL POST-EMPLOYMENT LAW RESTRICTIONS APPLICABLE TO ALL GOVERNMENT EMPLOYEES

Section 207(a) of title 18, United States Code, prohibits a former Federal employee from knowingly, with the intent to influence, making any communication to or appearance before an employee of the Executive branch or Federal court in connection with a particular matter involving specific parties, in which the United States is a party or has a direct and substantial interest AND either a) in which the former Federal employee participated personally and substantially during his Federal employment, or b) which he reasonably should have known was pending under his official responsibility within one year prior to termination of Government employment. In essence, these two restrictions prohibit a former employee who participated in a matter while employed by the Government from "side-switching" by representing an entity other than the Government before the United States on the same matter. Representation of another before the Congress is not subject to this ban and is thus permitted.

The term "**particular matter involving specific parties**" means a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving specific parties in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2641.201(h). A "particular matter involving specific parties" usually does not encompass general rule-making because rule-making seldom involves specific parties. The particular matter must involve specific parties both at the time the employee participated in it as part of his official duty and at the time the former employee represents another back to a Federal agency, although the parties need not be the same. In the case of contracts, a new matter typically does not arise simply because there are amendments, modifications or extensions of a contract. Id. at § 2641,201(hg)(5)(ii)(A). Successive or otherwise separate contracts or other agreements will be viewed as different matters from each other, absent some indication that one contract contemplated the other or that both are in support of the same specific proceeding.

As to umbrella type contracts, e.g. an indefinite delivery indefinite quantity (IDIQ) contract, I note participation in underlying task will generally be viewed as participation in the umbrella contract, because a contract is almost always a single particular matter involving specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if an agency determines that articulated lines of division exist. In making this determination, an agency should consider the relevant factors as described above. No single factor should be determinative, and any divisions must be based on the contract's characteristics, which may include, among other things, performance at different geographical locations, separate and distinct subject matters, the separate negotiation or competition of individual task or delivery orders, and the involvement of different program offices or even different agencies. Id. at § 2641.201(h)(5)(ii)(C).

I note that, standing alone, the Master Plan to develop the West LA campus does not constitute a specific party matter that could trigger the post-Government employment restrictions. Rather we view it as one of general applicability such as a rulemaking. The Executive Director, Master Plan provided the following background information. There were conversations and preliminary planning activities related to redeveloping the West LA campus, both at the local L.A. level and up to the Secretary's office, that pre-dated the *Valentini v. Shinseki* litigation by years if not decades. The Master Plan involved input from hundreds, if not thousands of parties. Further, while the Draft Master Plan that then Secretary Bob McDonald approved in January 2016 did effectuate the settlement of the *Valentini v. Shinseki* litigation, it also represented the culmination of the prior conversations and took into consideration all kinds of input from Veterans, VSOs, local community groups, local and Federal elected officials, engagement with private-sector planning firms, and over a thousand public comments submitted through a formal public outreach process. The various leases, EULs, and

other contractual arrangements that will be necessary to implement the Draft Master Plan are all particular matters involving specific parties.

To "**participate personally and substantially**" means to participate directly and significantly through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. Personal participation includes the direct and active supervision of the participation of any person you supervise, including a subordinate. 5 C.F.R. § 2641.201(i). For an official at your level, being briefed on a specific party matter would constitute personal and substantial participation.

"**Appearance**" and "**communication**" are the terms contemplated by the act of representation, which should not be confused with the more formal representation of a client by an attorney. A communication occurs when you impart or transmit information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in writing, electronically or by any other means. This includes communication intended to be attributed to you, regardless of whether the Federal employee actually recognizes you as the source of the information. An appearance occurs when you physically present yourself before an employee of the Federal Government, formally or informally. An appearance need not involve any communication – sometimes mere presence at a meeting may be considered an appearance.

The restriction applies only to those communications and appearances made to a Federal employee with the "**intent to influence**." This may include any representations that may be interpreted as an attempt to persuade the employee to take or not take action. The appearance and communication must be made **on behalf of someone else** in order for a violation of the post-Government employment prohibitions to occur. e.g. a VA contractor or subcontractor, or an LLC, including one that you establish constitutes a legal entity distinct from yourself. You may always represent yourself, including your sole proprietorship (should you ever have one). A critical function of section 207 is to prevent former Government employees from leveraging relationships forged during their Government service to assist others in their dealings with the Government. OGE LA (Legal Advisory) 16-08. Hence you could, in your individual capacity, meaning not on behalf of another person or company, including an LLC you might establish, serve as a contractor for VA advising on matters in which you were officially involved without running afoul of the post-Government employment prohibitions.

On behalf of any other person. A former employee makes a communication or appearance on behalf of another person if the former employee is acting as the other person's agent or attorney, or 1) if the former employee is acting with the consent of another person, whether express or implied, and 2) the former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

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The prohibition on representing someone in the same matter in which you participated personally and substantially during your Federal employment is a lifetime ban and lasts for the lifetime of the particular matter. 18 U.S.C. § 207(a)(1). The prohibition on representing someone in the same matter that was under your official responsibility in the last year of Government service (where your participation was not personal and substantial) lasts for two years commencing on the date you leave Government service.

Applicability of the Lifetime Ban. Thus, for the lifetime of the matter, you are prohibited from representing a non-Federal entity before the Executive branch or a Federal court in any particular matter involving specific parties in which you participated personally and substantially while in Government service. Specific party matters covered by this ban include: Any EUL or ESA for which you provided legal support, including those pertaining to buildings 205, 208 and 209 at the West LA Campus, the contemplated EUL for MacArthur Field; any matter before the GAO; the U.S. Civilian Board of Contract Appeals or the U.S. Court of Federal Claims which you handled, supervised, or provided expertise on; any contract in support of the "super-construction projects" on which you provided guidance; the donation agreement for Omaha Nebraska; the interim bridge contract with KT; the parking contract at West LA; the MOU with the City of New Orleans; and the Letter of Intent enabling third party fundraising to preserve historic buildings on the West LA campus. There may of course be other specific party matters in which you participated personally and substantially as part of your official duties, and those would be subject to this restriction, as well. I realize that some of the specific party matters which I enumerated may be closed, in which case they should not raise any post-Government employment issues.

Testifying as an Expert Witness. Additionally, you should be aware that section 207(a)(1) of title 18, United States Code, generally bars a former employee from testifying as an expert witness on the same official matter in which the former employee participated for the Government. This ban is applicable regardless of whether the former employee is compensated. Should you be asked to testify as an expert witness on behalf of any non-Federal entity in a matter that you know of from your Federal employment, we recommend that you seek additional ethics advice.

Applicability of the Two-Year Ban. The two-year prohibition on representing a non-Federal party back to the Government in a particular matter under your official responsibility during your last year of Government service applies to you only when you did not participate personally and substantially in a matter, but the matter was actually pending under your official responsibility. "Official responsibility" means the direct administrative or operating authority whether intermediate or final, exercisable alone or with others, and either personally or through subordinates, to approve, disapprove or to otherwise direct Government actions. 5 C.F.R. § 2641.202(j). A matter was "actually pending" under a former employee's official responsibility if the matter was referred to or under consideration by persons within the employee's area of responsibility. Any specific party matter, such as a contract, EUL, ESA, or litigation, assigned to one of

your subordinates, during your last year of employment, not subject to the lifetime ban, would still be subject to the two-year ban.

Procurement Integrity Act. The Procurement Integrity Act places restrictions on the acceptance of compensation from a contractor. It specifically provides that a former Federal employee may not accept compensation from a contractor within a one-year period if the former Federal employee: 1) served, when the contractor was selected or awarded a contract, as the procuring contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team in a procurement in excess of $10 million; or 2) served as a program manager, deputy program manager or administrative contracting officer for a contract in excess of $10 million awarded to that contractor; or 3) personally made a decision to award a contract, subcontract, modification of a contract or subcontract, or task order or delivery order in excess of $10 million to that contractor, to establish rates applicable to a contract or contracts for that contractor that are valued in excess of $10 million, approve issuance of one or more contract payments in excess of $10 million to that contractor, or pay or settle a claim in excess of $10 million with that contractor. A former Federal employee who fits within one of these categories may, nonetheless, accept compensation from a different division or affiliate of that contractor, if that division or affiliate does not produce the same or similar products or services. Based on the information you provided, I have determined that these restrictions are not applicable to you.

Applicability of Compensation Restriction – 18 U.S.C. § 203. There is a prohibition against sharing in any compensation for representational services before the Government, rendered by another, which was earned at a time when the former employee was still employed by the Government. Accordingly, after you leave Government service, you may not share in compensation for representational services before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest, which were provided while you were still a Federal employee. This prohibition may affect you after you leave the Government if you share in the proceeds of a partnership or business that includes earnings for representational services that occurred before you terminated Federal service. (Examples of such representational activities include lobbying, consulting, and work done by law firms.)

If you find in the future that your non-Federal employer represented third parties before the Federal Government while you were a Federal employee, ensure that your compensation is structured in a way that does not involve your sharing in profits derived from those representational services. Note also, that where an organization does not provide representational services to third parties, but simply deals with the Government in order to obtain Federal funding or approval for its own business purposes, section 203 does not prohibit a former Government employee from participating in any resulting compensation.

Use of Non-Public Information. You are reminded that you are precluded from using information gained while employed by VA that is generally not available to the public, (for example, proprietary or source selection information) if the use of that "inside" information would give you or anyone else an unfair financial or commercial advantage. Additionally, 18 U.S.C. §§ 1831, 1832 and 1905 protect and prohibit the use or disclosure of trade secrets, confidential business information, and classified information.

Also, if you participate in preparing a competitive proposal on behalf of your employer or client, and the participation requires that you share information gained during your employment as a Federal employee, you should inform your employer of this fact and encourage your employer to communicate with the Contracting Officer in accordance with FAR 3.104 and 9.505.

None of the above restrictions, except for the procurement integrity ones which do not apply, prohibits you from accepting employment with, or compensation from, any particular person or organization. In addition, as noted, none of these restrictions, except the one applicable to foreign entities, prohibits a former Executive Branch employee from representing others before Congress. Self-representation and the expression of personal views that are not made as agent or representative of another are not affected by these rules. Communications that are not made with intent to influence the Government, such as requests for the status of a matter or for publicly-available information, are also allowed. It is important to remember that these bans are representational - nothing prohibits your behind-the-scenes participation in any matter including those matters in which you personally participated while at VA.

Please note that my opinion as an agency ethics official concerning 18 U.S.C. § 207 does not have the same weight as an opinion authorized by a specific statute, such as the Procurement Integrity Act. See 41 U.S.C. § 2104. My opinion on this statute does not bind the Department of Justice, although good faith reliance on my advice is a factor that may be taken into consideration by that Department in selecting cases for prosecution. 5 C.F.R. § 2641.105. This letter, issued under the authority of 41 U.S.C. § 2104(c) and 5 C.F.R. § 2641.105, is an advisory opinion of an agency ethics official based on factual information that you have provided.

I hope that this information is helpful to you. Please do not hesitate to contact our office if circumstances change or if there are changes in your work plans or assignment so that we may amend this advice, if necessary. Additionally, please do not hesitate to contact our office at any time with questions that may pertain to these post-

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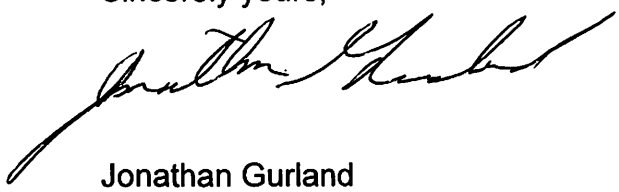
Government employment restrictions, even after you have left Federal service. You may contact me at (202) 461-7653 or at jonathan.gurland@va.gov.

Sincerely yours,



Jonathan Gurland
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