May 2021

MEMORANDUM

TO: Marvin Figueroa
Director – Office of Intergovernmental and External Affairs

FROM: Sean McCluskie
Chief of Staff
Department of Health and Human Services

SUBJECT: Limited Authorization to Participate in Matters Involving the State of Virginia

The purpose of this memorandum is to authorize you, under 5 C.F.R. § 2635.502(d), to participate in specific-party matters involving, as a party or party representative, the State of Virginia, for whom you served as an employee until January 22, 2021. After weighing the factors articulated in section 502(d), and consulting with the Department's OGC Ethics Division, I have determined that the governmental interest in your participation in these specific party matters outweighs any countervailing appearance concerns and authorize your participation in these specific party matters as described in more detail, and subject to the limitations, below. Note, this authorization does not affect the application of the prior-employer recusal requirement of 5 C.F.R. 2635.502 and the Ethics Pledge (Executive Order 13989) to matters involving any of your prior employers other than the State of Virginia.

BACKGROUND

On January 22, 2021, you resigned your position as Deputy Secretary of Health and Human Resources in the Office of Governor Ralph S. Northam of the State of Virginia to accept an appointment at the Department of Health and Human Services (HHS or Department) as the Director for the Office of Intergovernmental and External Affairs (IEA). You retain a defined contribution retirement plan sponsored by the State of Virginia, however, neither you nor the State will make any additional contributions. You have no other financial relationship with the State of Virginia.

Your tenure as Director of IEA began on January 25, 2021, and your primary responsibility is to be the Department's liaison to state, local, and tribal governments and non-governmental organizations regarding the HHS programs and priorities. Specifically, you and the IEA staff you oversee share information with stakeholders, ensuring those affected have a clear understanding of how the various policies and initiatives could apply to them. You and your team also provide a platform for outside stakeholders to give feedback with those affected and receive information to bring back and relay that information to HHS leadership. You also oversee the Regional Offices where the Regional Directors and their staff work closely with the state, local, and tribal governmental officials and offices, as well as non-government organizations to communicate HHS initiatives and policy to outside stakeholders in their respective regions.

You have fifteen years of experience in communications and government affairs. For one year prior to your appointment, you served as the Deputy Secretary of Health and Human Resources in the Office of Governor Ralph S. Northam of the State of Virginia. In that position, you supported state

agencies to ensure they delivered quality, affordable, and accessible services to individuals with disabilities, the aging community, and low-income working families. Prior to that, you worked as Governor Northam's Legislative Director where you spearheaded efforts to leverage relationships with Members of Congress, General Assembly Members, legislative staff, constituency groups, and partner organizations to secure passage of the Governor's legislative priorities in education, energy, criminal justice reform, transportation, and health care. Your skills and experience make you especially qualified to serve as the IEA Director.

As the Director of IEA for HHS, your communication with the general public about all major HHS programs, policies, and initiatives is an integral part of your official duties. To effectively carry out your function as the Director of IEA for HHS, you will work with states, territories, tribes, other federal agencies, non-governmental organizations, and industry stakeholders to ensure those entities receive clear communication on the work of the Department. These contacts may occur as a larger meeting that may not be considered a particular matter involving specific parties or as one-on-one or small group meetings or conversations that would be considered a party matter. To effectively perform your duties, it is important that you be able to work with all states and territories, including the State of Virginia.

LEGAL ANALYSIS

Under the Standards of Ethical Conduct for Employees of the Executive Branch, a federal employee may not participate in a particular matter involving specific parties if one of the parties is, or is represented by, an entity with which the employee has a "covered relationship" and where the circumstances would cause a reasonable person to question the employee's impartiality in the matter. "Covered relationship[s]" include persons or entities for which the employee has within the last year served as an employee or consultant. See 5 C.F.R. § 2635.502(b)(1)(iv). This requirement of disqualification only applies to "particular matter[s] involving specific parties" and not to "particular matter[s] of general applicability" or broad policy matters. It applies, for example, to litigation, grant awards, contracts, and other matters involving a specific request, determination, or ruling, but not to legislation or regulations that might affect an entity as part of a group. When an employee's participation in a particular matter involving specific parties gives rise to a concern about the employee's impartiality in the matter, the employee may be authorized to participate in the matter if the federal government's interest in the employee's participation outweighs the concern of a potential appearance of a lack of integrity in the agency's program and operations. See 5 C.F.R. § 2635.502(d).

You served as the Deputy Secretary of Health and Human Resources in the Office of Governor Ralph S. Northam for the State of Virginia within the last year. As such, you have a covered relationship with the state. Furthermore, issues on which you provided services to the State of Virginia overlap with issues addressed by HHS. These circumstances may give a reasonable person cause to question your impartiality in matters involving the State of Virginia. Therefore, in order for you to participate in a particular matter in which the State of Virginia is a party or represents a party, I must first authorize your participation after determining, in light of all the circumstances, that the interest of the Government in your participation outweighs the concern that a reasonable person may question the integrity of the programs and operations of HHS.

The ethics regulations provide that I may consider the following factors in determining whether to authorize your participation:

1. ***Nature of the relationship.*** In total, you were employed by the State of Virginia for less than three years. You are not on a leave of absence from, nor do you have a continuing a relationship with, the State of Virginia. You are retaining a defined contribution retirement plan sponsored by the state, but Virginia will not make any additional contributions and you have no other personal financial interests that would create a conflict of interest with the state. Markedly different from private, for-profit entities, state governments as prior employers are generally less likely to create the type of bias or appearance of special treatment that 5 C.F.R. § 2635.502 was meant to prevent.

2. ***Effect of the matter on the finances of the State of Virginia.*** As the IEA Director, your responsibilities will touch on a broad array of the policies and operations of the Department, and you are likely to participate in matters that are of significance to the financial interests of all the states, including Virginia. Though the nature of your work is to engage in direct contact with each stakeholder, including the States, the substantive policies and programs that form the basis of your liaison work will impact all states in a comparable manner. Under these circumstances, sharing with State of Virginia the Department's policies and initiatives is not likely to have a special or unique impact on the state and would not require Virginia's exclusion from such external affairs work to avoid special access or appearance concerns.

   It is possible that you will be asked to participate personally and substantially in specific party matters that affect the financial interests of the State of Virginia. Inasmuch as your participation in a specific party matter is an application of, or is concerned with, Departmental or Administration policy, it would be unlikely that such application of policy would favorably advantage any particular state. Rather, it would be presumed to have equal application to all similarly situated states. Furthermore, the financial effect of any specific party matters involving states in which you are likely to participate is not particularly significant relative to the financial effect of the Department's work, which would have an equal effect across all states.

3. ***Nature and importance of your role.*** As the IEA Director, your role includes organizing meetings with state, tribal, territorial, local and community leadership to solicit feedback on current Department policy and initiatives. You will be meeting with officials from other states and this authorization will give you an opportunity to hear the views of officials from the State of Virginia and not exclude them from informational or policy discussions with you. You were selected for your unique expertise based on your experience in dealing with state and local government entities and having experience liaising with local and municipal government officials, and groups representing diverse constituencies that have a stake in the work of the Department.

4. ***Sensitivity of the matter.*** The Department address some of the most sensitive issues within the federal government, including the COVID-19 pandemic response, Unaccompanied Children in the custody of the Department, the civil rights of citizens in a healthcare setting, and healthcare policy generally. Your duties primarily include meeting with outside

stakeholders to discuss the entire spectrum of Department's work as it pertains to the different stakeholders. It is important that all states have equal access to the Department to discuss various Departmental priorities.

5. ***Difficulty of reassigning the matter.*** Your duties cannot be readily assigned to another employee, without significant cost to the efficiency of agency operations. *See* 5 C.F.R. § 2635.502(d)(5). It would be inefficient to reassign these management duties based on a single stakeholder's participation or interest in a matter, as reassignment could create discord in function and policy. Furthermore, reassignment to a subordinate advisor would unduly disadvantage the citizens of Virginia were the Department to engage with that state in a different manner than the other states and territories. While other policy advisors will often also be present, having the IEA Director at the meetings will allow for further relationship building as well as equal time given to each respective state. Therefore, the duties of the IEA Director cannot readily be reassigned.

6. ***Adjustments to your duties.*** You were brought to HHS because of your extensive experience working with state governments and various stakeholder groups. Alteration to your duties would undermine the value you bring to the Department. As stated above, such changes would cause the Department to lose the benefit of your expertise in party matters involving the State of Virginia, which is inefficient and could harm HHS's public affairs capabilities. The provisions of 5 C.F.R. § 2635.502 were written in recognition of the reality that we cannot have unreasonably restrictive requirements of disqualification that prevent the use of the most qualified employees in matters such as these.

LIMITATIONS

This waiver is limited. It does not apply to any entity covered by 5 C.F.R. § 2635.502(a) other than the State of Virginia. It does not remove your obligation to follow any other provision of the Ethics Pledge or any other ethics law, rule, or regulation. Finally, this authorization expires on January 22, 2022, the end date of your regulatory recusal obligation.

DECISION

In accordance with 5 C.F.R. § 2635.502(d), I have determined that, in light of all the circumstances, the interest of the Government in your participation in specific party matters involving the State of Virginia, your former employer, as a party or party representative outweighs any concern about a potential appearance of lack of integrity. Therefore the limited authorization as described above is granted.

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Sean McCluskie Date

cc: OGC/Ethics Division