



FAIR POLITICAL PRACTICES COMMISSION

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August 7, 1998

Patrick Sanger
Hearst Monument Foundation
717 K St. Suite 400
Sacramento, California 95814

**Re: Your Request for Advice
Our File No. A-98-139a**

Dear Mr. Sanger:

This letter is in response to your request for advice regarding Section 87406 of the Political Reform Act (the "Act"). After speaking with you and Donald Murphy regarding the *Shurtleff* Advice Letter, No. I-98-139, we have decided that it is appropriate to provide you with formal written advice pursuant to Regulation 18329.¹

QUESTION

May you communicate with the California Department of Parks and Recreation about any matter relating to Hearst Castle?

CONCLUSION

Yes. The post-employment restrictions of the Act do not prevent you from communicating with the California Department of Parks and Recreation about any matter relating to Hearst Castle.

FACTS

The Hearst San Simeon Monument Foundation (the "HMF") was established in 1992 as an exempt Section 501(c)(3) organization. The HMF is dedicated to the preservation, restoration and enhancement of Hearst Castle. In that connection, the HMF seeks to work closely and

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

cooperatively with the California Department of Parks and Recreation (the "Parks Department") in pursuit of this common goal.

The HMF and the Parks Department have previously entered into two principal agreements -- a Contract dated December 23, 1991, and a License Agreement dated April 12, 1996. Their relationship is also guided by the state's Cooperating Associations Program Manual. We have been provided copies of these three documents.

Recently, the HMF and the Parks Department have been in a dialogue as to restructuring their relationship, including a redo of their contractual roles as defined by the two agreements referenced above. Among other things, HMF wishes to (1) run the museum; (2) set up a membership program whereby members would receive certain benefits and privileges related to the museum; (3) rework the licensing agreement; and (4) get office space for HMF on the grounds of the museum.

You became the Executive Assistant of the HMF on January 1, 1998. From May 1, 1996, to December 31, 1997, you were a Graduate Student Assistant with the Parks Department. In that role, you conducted research related to federal recreation and conservation programs and the Land and Water Conservation Fund. At no time during your tenure with the Parks Department did you become involved with decisions relating to Hearst Castle. You were not a designated employee with the Parks Department. In addition, by telephone on May 27, 1998, you disclosed that all your work was supervised and/or ministerial and that all your work product received significant intervening substantive review.

ANALYSIS

You have requested advice regarding the post-employment restrictions found in Section 87406, colloquially known as the "revolving door" prohibition. The Act places certain restrictions on individuals who have recently left state service and who wish to use the expertise and relationships they developed at their former agency for compensation by third persons.

The One-Year Ban ("Revolving Door")

Section 87406(d)(1) of the Act provides, in pertinent part, that no officer or designated employee of a state administrative agency:

"[F]or a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12

months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991."

You write to ask whether you are subject to Section 87406. You are subject to the restrictions found in Section 87406 if: (1) you were a "designated employee" of the Parks Department; or, (2) as a graduate student assistant, you held a position which entailed the making, or participating in the making, of decisions which may foreseeably have had a material effect on any financial interest. Since you were not a designated employee of the Parks Department, the provisions of Section 87406(d) are only applicable to you if your duties as an employee included making or participating in the making of decisions which may have affected any financial interest.

Under Regulation 18700,² an employee of a state agency *makes* a governmental decision when, acting within his or her authority, he or she: (1) votes on a matter; (2) appoints a person; (3) obligates or commits his or her agency to any course of action; (4) enters into any contractual agreement on behalf of his or her agency; or (5) determines not to act, appoint a person, obligate his or her agency, or enter into any contractual agreement, other than for reasons of conflict of interest identified in accordance with agency regulations adopted pursuant to Section 87300.

An employee of a state agency *participates in the making* of a governmental decision when, acting within the authority of his or her position, he or she: (1) negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; (2) advises or makes recommendations to the decisionmaker, either directly or without significant intervening substantive review, by either: (A) conducting research or an investigation, which requires the exercise of independent judgment on the part of the employee, where the outcome of such research or investigation will influence a decision; or (B) preparing or presenting any report, analysis or opinion, which requires the exercise of independent judgment

² Although the Commission promulgated Regulation 18700 with reference to Section 87100 of the Act, the regulation's definitions are instructive for defining the provisions of the Act.

on the part of the employee, where the purpose of such a report, analysis or opinion is to influence a decision. (*Martinez Advice Letter*, No. A-94-085.)

After speaking with you on the telephone on May 27, 1998, it is clear that you did not make or participate in the making of a governmental decision since all your work was supervised and/or ministerial and your work product received significant intervening substantive review. Therefore, you did not hold a position which entailed the making, or participating in the making, of decisions which may foreseeably have had a material effect on any financial interest. Therefore, Section 87406 is not applicable to you.

Permanent Ban on "Switching Sides"

Sections 87401 and 87402 provide an additional restriction on the post-governmental employment activity of former public officials that may apply even where Section 87406 does not, or where the one year prohibition in Section 87406 has run. They provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

- (a) The State of California is a party or has a direct and substantial interest.
- (b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Since you never participated in any proceeding regarding Hearst Castle during your tenure with the Parks Department, the permanent ban does not restrict your ability to communicate with the Parks Department regarding Hearst Castle or the HMF.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel

Marte Castaños / t/s

By: Marte Castaños
Staff Counsel, Legal Division

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