



OFFICE OF ADMINISTRATIVE HEARINGS

State of California

GENERAL JURISDICTION DIVISION

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Department of General Services

Governor Edmund G. Brown Jr.

July 19, 2017

Executive Director
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Subject: Alai, George
OAH No. 2016090791
Agency No. 13/1135

Enclosed are the following:

- The original Proposed Decision
- An agency order of adoption. If the Proposed Decision is adopted, please return a copy of the signed adoption order to the Office of Administrative Hearings.
- The original Decision
- Exhibits numbered: 1 – 66 and A – O
Please make sure you have received all listed exhibits. If exhibits are missing, please contact OAH immediately.
- Email copy of the Proposed Decision to:
- The above referenced case was resolved prior to conclusion of the hearing. We are returning the enclosed original exhibits 1 – x to you.

TLK:nb

Encl.

Transmittal Form
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BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of the First Amended
Accusation Against:

GEORGÉ ALAI,

Respondent.

Case No. 13/1135

OAH No. 2016090791

PROPOSED DECISION

Administrative Law Judge (ALJ) Tiffany L. King, State of California, Office of Administrative Hearings (OAH), heard this matter on March 20 and 21, 2017, in Sacramento, California.

The Fair Political Practices Commission (Complainant, Commission or FPPC) was represented by Angela J. Brereton, Senior Commission Counsel, and Toren Lewis, Commission Counsel.

Respondent George Alai was present and represented by Lawrence King, Attorney at Law.

Oral and documentary evidence was received. At the conclusion of the evidentiary hearing, the record remained open through June 19, 2017, for written closing arguments. Thereafter, complainant and respondent timely submitted their opening briefs, marked for identification respectively as Exhibits 65 and N; and their reply briefs, marked for identification respectively as Exhibits 66 and O.

On June 19, 2017, complainant also filed a First Amended Accusation, which changed the computer model numbers for the three purchase orders listed in column 5 of paragraph 20 from Z280/Z280/Z280 to Z800/Z800/Z820. Respondent timely filed an objection, asserting these changes are not minor, not supported by the evidence offered at hearing, and were not timely submitted. An agency may file an amended accusation at any time before the matter is submitted for decision. (Gov. Code, § 11507.) If the amended accusation presents new charges, the respondent shall be afforded a reasonable opportunity to prepare a defense to the new charges. "The ALJ may allow exceptions for minor amendments during Hearing." (Cal. Code Regs., tit. 1, § 1014, subd. (a).)

The changes in the First Amended Accusation are not substantive and do not present new charges against respondent, but merely correct typographical errors in the original Accusation. The model numbers comport with those listed on the justification forms which respondent is alleged to have signed, and which were produced during discovery and admitted into evidence during the hearing. There is no prejudice to respondent. Accordingly, the First Amended Accusation is accepted.

The record was closed and the matter was submitted for decision on June 19, 2017.

FACTUAL FINDINGS

1. Complainant filed the Accusation on April 27, 2016, following an April 13, 2016 finding of probable cause that respondent violated provisions of the Political Reform Act (Gov. Code, § 81000 et seq.) Complainant's authority to bring this action is derived from California Code of Regulations, title 2 (2 CCR), section 183761.4, subdivision (e), and Government Code sections 83111, 83116, and 91000.5,¹ which assign to the Commission the duty to administer, implement, and enforce the provisions of the Political Reform Act (Act). Respondent timely filed a notice of defense. This hearing followed.

2. From August 1, 2012, through March 11, 2014, respondent was a Data Processing Manager IV, commonly known as Chief Technology Officer (CTO), in the Information Technology Services Division (ITSD) of the California Department of General Services (DGS), a state agency which serves as the business manager for the state.² Respondent was previously employed by Hewlett Packard Company (HP) for over 30 years. At all relevant times, respondent owned shares of stock in HP worth more than \$25,000.

3. At all relevant times, Jeffrey Funk (Funk) was the Chief Information Officer (CIO) for DGS. Funk hired respondent as CTO and was respondent's immediate supervisor.

Statement of Economic Interest

4. When respondent applied for the CTO position in 2012, the job announcement to which he responded provided, in relevant part:

This position is designated under the Conflict of Interest Code. The position is responsible for making, or participating in the making of governmental decisions that may potentially have a material effect on personal financial interests. The appointee is required to complete form 700 [*sic*] within 30 days of

¹ Unless otherwise stated, all statutory references are to the Government Code.

² At hearing, the ALJ disclosed that OAH fell under the DGS umbrella of boards, departments, and offices. Neither party objected to OAH hearing this matter.

appointment. Failure to comply with the Conflict of Interest Code requirements may void the appointment.

5. Following his job interview, respondent told Funk he was concerned about the conflict of interest statement in the job announcement. Funk assuaged this concern by assuring respondent he would not be performing any procurement activities as the CTO. Upon his hire, respondent's duty statement did not include any procurement duties and did not state that his position was a designated position in the Conflict of Interest Code for which a Statement of Economic Interests (Form 700) must be filed. Nor was the Data Processing Manager IV position, or CTO job title, designated in DGS's Conflict of Interest Code (in 2012), as one requiring a Form 700 be filed. Accordingly, respondent did not file a Form 700 upon his hire, nor at any time in 2012.

6. On January 29, 2013, and February 19, 2013, DGS sent an email to all DGS employees reminding them to file a Form 700 for the 2012 reporting period if their position was designated in the Conflict of Interest Code. Respondent reviewed the Conflict of Interest Code on DGS's website and confirmed his position was not designated as having to file a Form 700. On February 19, 2013, DGS sent a second reminder email to all DGS employees. After receiving the second email, respondent asked Funk why he kept receiving the reminder email if his position was not designated in the Conflict of Interest Code, and his duties did not include procurement. Funk told respondent to "just go ahead [and file a Form 700] and voluntarily disclose [any economic interests]." At hearing, Funk explained there had been a lot of confusion in his unit about who was required to file, so he requested everyone voluntarily submit a Form 700.

7. On March 8, 2013, at Funk's direction, respondent filed a Form 700 wherein he disclosed his ownership of HP stock. At no time did respondent conceal his investment interest in HP from DGS.

8. At no time during his DGS employment did respondent receive training on the state's conflict of interest rules or the Political Reform Act.

Leveraged Procurement Agreement for HP Products

9. HP is an international technology company, which manufactures products including desktop workstations and laptop computers. HP does not directly sell its products to federal, state or local agencies. In 2009, in order to sell products to California state agencies, HP partnered with Western Blue Corporation (Western Blue) and Insight Public Sector (Insight) as Joint Prime Contract Holders under a mandatory contract called a Leveraged Procurement Agreement (LPA). In this joint venture, Western Blue was the sales and service entity; Insight was the distributor; and HP was the manufacturer of products. The LPA mandated that all state agency requests for HP personal computer products, services and support must be directed to Western Blue/Insight/HP. Purchase orders submitted pursuant to the LPA identified the supplier as "Western Blue/Insight/HP." After receiving an authorized purchase order under the LPA, Western Blue purchased HP products

from Insight (distributor), which were then delivered to DGS for testing and eventual delivery to the customer who requested the products.

10. Because the LPA was a mandatory contract for HP products, there was no solicitation for bids. If a state agency requested to purchase HP products, they had to go with the vendor, in this case Western Blue/Insight/HP, listed in the mandatory contract and buy the specific brands of workstations identified in the contract. Accordingly, when a state agency requested to purchase information technology (IT) products, it was not possible for CIO or CTO at DGS to influence or direct to which vendor the procurements went. All procurements were automatically directed to Western Blue/Insight/HP.

11. To request IT products, the requesting DGS division must submit an acquisition package to ITSD, which includes a Desktop & Mobile Computing Justification Form (Form-DMC). The Form-DMC is an internal DGS form intended to ensure that the requested IT products are consistent with statewide IT policies and standards as well as with DGS's IT policies and standards. The form allows DGS to maintain its delegation of authority from other state agencies to approve certain purchases of IT products without obtaining a Feasibility Study Report – a resource and time-consuming process – for each IT purchase order. To be processed, every purchase order for IT products requires a completed and approved Form-DMC. The Form-DMC must be signed by the DGS Chief of Office of Technology Resources (CTR), followed by the CIO. As CTO, respondent was authorized to sign Form-DMC's when the CIO was absent or otherwise unavailable.

12. The following statement was listed in bold above the sections designated for the CTR's and CIO's signatures: **“By signing this form, I declare that I have no direct or indirect investments, real property or interest in any company, business, entity or organization that may involve the project or contract.”**

Above the section designated for the CTR's signature was the following statement:

I have reviewed the proposed use of this desktop and/or mobile computing configuration or product and have determined the use to be consistent with our agency's Desktop and Mobile Computing Policy. The proposed configuration or product complies with all applicable security requirements included in the SAM.³

The following statement was listed above the signature line for the CIO:

I certify that I am the agency director or designee, that the matters described herein are consistent with this agency's current information management strategy and information technology infrastructure; that these matters comply with this

³ State Administration Manual.

agency's approved Desktop and Mobile Computing Policy; that the matters described herein are subject to the provisions of SAM Section 4819.3 et seq. and are in conformity with the criteria and procedures for information technology and security prescribed in SAM; and that the foregoing statements are true to the best of my knowledge and belief.

13. After the CIO, or in the CIO's absence the CTO, signs the Form-DMC, it is forwarded to DGS's procurement office, which would assemble the necessary paperwork and process the procurement through the Automated Business Management System (ABMS).

14. In signing the Form-DMC, the CIO or CTO does not exercise any discretion. As DGS's IT purchaser, Kathleen Schnabel, testified the CIO/CTO's review of the Form-DMC would be a "cursory review" when there is a mandatory contract which dictates a specific brand of workstations that can be purchased.

15. Sometimes, the Form-DMC has the related purchase order attached to it. Other times, the form is submitted to the CIO/CTO by itself without any other paperwork. The Form-DMC lists the IT products requested for purchase, but does not identify the vendor from where DGS will buy the products. As Funk testified, there were times he signed the Form-DMC after the items were already purchased "so that the paperwork reflected what had been purchased."

Form-DMC's signed by Respondent

16. Funk instructed respondent to sign any Form-DMC that arrived in Funk's absence that had been signed by the CTR. Funk told respondent that the CTR's signature meant that his office had looked up the requested product and ensured it was in the LPA on a list of approved products. Funk explained to respondent that the CIO/CTO signature was a "very routine activity." He did not authorize respondent to do any independent analysis or investigation. Funk's instructions were clear: if the CTR signed the Form-DMC, then respondent was to sign it; if the CTR had not signed the form, respondent was not to sign it but return it to the Office of Technology Resources.

17. At all relevant times, Faizi Pourhosseini was Chief of the DGS Real Estate Services Division ("RESD"), Professional Services Branch, Architecture and Engineering Section, which made the request for the HP products in question in this matter. As chief of the requesting DGS program, in November 2012, he signed two purchase orders for HP products.

18. For the first purchase order, DGS No. 3166552, respondent received a Form-DMC, which listed 10 Z800 workstations for a total purchase price of \$40,932.28. On the form, \$40,932.28 was lined through and the price of \$23,395.11 was handwritten next to it. The original purchase order was attached to the Form-DMC, and listed five HP Z800 workstations for the purchase amount of \$23,395.11. For the second purchase order, DGS

No. 3168126, respondent received a Form-DMC which listed 10 Z800 workstations for a total purchase price of \$40,932.28. The amount of \$40,932.28 was again lined through, \$17,537.17 was handwritten next to it and also lined out, then \$17,158.50 was handwritten on the same line. The original purchase order was attached to the Form-DMC, and listed five HP Z800 workstations for the purchase amount of \$17,537.17. Respondent reviewed both Form-DMC's and confirmed they were signed by the CTR. He then signed and dated both forms on November 20, 2012.

19. At no time did anyone discuss the number, type or source of the products requested by RESD's Architecture and Engineering Section. Nor did respondent attempt to influence the number, type or source of products requested for purchase.

20. Ultimately, DGS never purchased any of the HP workstations listed on the Form-DMC's signed by respondent as the HP Z800 had been discontinued by HP. Rather, in early 2013, DGS obtained new quotes for the HP Z820 workstations. Two new purchase orders with the same purchase order numbers were generated. The first purchase order, DGS No. 3166552, listed five HP Z820 workstations for the purchase price of \$17,479.26. The second purchase order, DGS 3168126, listed five HP Z820 workstations for the purchase price of \$17,158.50. Respondent never reviewed or signed Form-DMC's for these revised/new purchase orders or for the purchase of any HP Z820 workstations.

21. In June 2013, a third purchase order, DGS No. 3170052, was submitted for the purchase of five HP Z820 workstations for the price of \$18,696.69. On June 9, 2013, the corresponding Form-DMC was signed. However, there was no evidence in the record to establish respondent signed the form.⁴

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⁴ In its closing brief, complainant argues a comparison of respondent's signatures on other documents in evidence are sufficient to establish he signed the June 9, 2013 Form-DMC. This argument is rejected. None of the signatures are identical or similar enough for a layperson to confirm they were made by the same person. The type of analysis which complainant suggests the ALJ conduct concerning the different signatures on these documents is appropriate for an expert witness, not a layperson. Complainant did not call a handwriting expert nor request a continuance to retain one. Alternatively, complainant argues that the ALJ admitted into evidence without objection the declaration by DGS's custodian of records that the Form-DMC's were true and correct copies of DGS's records, then which were produced by DGS's custodian of records, and therefore, the declaration establishes that respondent signed all three Form-DMC's. However, the declaration was admitted for the sole purpose of authenticating the documents, and not for establishing respondent's signature. Accordingly, this argument is also rejected.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proof in this case. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115; Cal. Code Regs., tit. 2, § 18361.5, subd. (c).)

2. In enacting the Political Reform Act, California voters specifically found and declared that previous laws regulating political practices had suffered from inadequate enforcement by state and local authorities (§ 81001, subd. (h)), and that it was their purpose that the Act be vigorously enforced (§ 81002, subd. (f)) and liberally construed to accomplish its purpose. (§§ 81001, subd. (h), 81002, subd. (f), and 81003.) The purpose of the Act is to disqualify public officials from certain matters to ensure that conflicts of interest are avoided. (§ 81002, subd. (c).) The Commission was established to administer, implement and enforce the Act. (§§ 83100, 83111, and 83123.)

3. The Act's governing regulations are found at 2 CCR section 18700 et seq. On April 27, 2015, the Commission made "non-substantive" changes to the regulations by revising and renumbering sections 18700 through 18709. The historical notes on the amended sections provide that such changes are "without regulatory effect." (See, e.g., Cal. Code Regs., tit. 2, § 18700, history note 17.) A memorandum to the Commission recommending the amendment, entitled "Adoption of Proposed Amendments to the Conflict of Interest Regulations – Regulation 18700," notes that the proposed change to section 18700 reduces the eight-step analysis to a four-step one in order to simplify and clarify the analysis to determine whether a public official has a prohibited conflict of interest.⁵

Respondent contends the current version of section 18700 should be applicable to the instant action, which was filed on October 21, 2015. Complainant argues the regulation should be applied as it existed in 2012 and 2013 when the alleged misconduct occurred.

The 2015 regulatory changes did not change existing law, but rather were intended to simplify and clarify the conflict of interest analysis. "A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment." (*Carter v. Ca. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922, citing *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) The same rationale can be applied to regulatory changes. Accordingly, the current version of section 18700 et seq. is applied herein.

4. Section 87100 prohibits any public official from making, participating in making or in any way attempting to use his official position to influence a governmental decision in which he has a financial interest. A public official has a financial interest in a

⁵ See, FPPC Memorandum, Adoption of Proposed Amendments to the Conflict of Interest Regulations – Regulation 18700 (April 25, 2013), available at www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/General%20Items/2013/April/28-1Memo%2018700.pdf, accessed on July 11, 2017.

governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's interests set forth in section 87103. An official has an interest in any business entity in which the official has a direct or indirect investment worth \$2,000 or more. (§ 87103, subd. (a).)

5. Public Official. As CTO for DGS, respondent was a public official for purposes of the Act at all relevant times. (§ 82048, subd. (a) [defining public official as "every member, officer, employee or consultant of a state or local government agency"].) At all times he was a public official, respondent had a direct investment in HP worth more than \$25,000. (Finding 2.)

6. Making a Governmental Decision. The Act's conflict of interest provisions apply only when a public official makes, participates in making, or attempts to influence a governmental decision in which he knows he has a financial interest. (§ 87100, Cal. Code Regs., tit. 2, § 18700, subd. (b)(2).) "A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, *obligates or commits his or her agency to any course of action*, or enters into any contractual agreement on behalf of his or her agency." (Cal. Code Regs., tit. 2, § 18704, subd. (a) (bolding added).)⁶ Making a governmental decision does not include actions by a public official that are solely "ministerial, secretarial, or clerical." (Cal. Code Regs., tit. 2, § 18704, subd. (d)(1).)⁷

7. While neither the Act nor its regulations define "ministerial," the Commission has held that "where an official has no discretion with respect to how the action will be performed or what the results would be, or acts pursuant to clear objective criteria[,] it would be a ministerial act." (*Torrance Advice Letter (A-94-043a)*.) Caselaw has similarly held a "ministerial act" to be one which does not involve discretion or exercise of judgment. (*Ortega v. Sacramento County Dept. of Health & Human Servs.* (2008) 161 Cal.App.4th 713, 728 [an act is ministerial when it amounts "only to obedience to orders which leave the officer no choice"]; *Myers v. Patterson* (1987) 196 Cal.App.3d 130, 136 [registrar performs a ministerial function when determining whether a ballot initiative meets all formal requirements, and has a ministerial duty to place the initiative on the ballot that complies with said requirements]; *Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1556 ["The corollary of that duty, applicable in *Myers*, is that the registrar has a duty to reject a ballot measure that does not comply with the formal requirements"].) "It is well-settled that, although a ministerial act by definition does not involve discretion, its performance may be contingent on the existence of certain facts." (*Lazan v. City of Riverside* (2006) 140 Cal.App.4th 453, 460 [city's ministerial duty to file for disability retirement on behalf of employee was contingent on having a belief the employee was disabled].)

⁶ The First Amended Accusation alleges respondent made a governmental decision because he "obligated or committed [DGS]" to complete the purchase orders to which the Form-DMC's were attached. There is no allegation that respondent participated in making, or used his official position to influence a governmental decision.

⁷ Formerly section 18702.4, subdivision (a)(1).

8. At the direction of his supervisor, on November 20, 2012, respondent signed two Form-DMC's for the total purchase of 10 Z800 HP workstations. (Findings 11, 16, 17, and 18.) In doing so, respondent exercised no discretion or judgment. Following Funk's instructions, he performed a cursory review of the forms to ensure they had been signed by the CTR. Having confirmed this requirement was met, respondent signed each form. (Findings 14, 16, and 18.) Accordingly, respondent's acts of signing the Form-DMC's were purely ministerial, and did not constitute "making a governmental decision."

9. Complainant argues that because the Form-DMC was a "necessary prerequisite" to complete the IT procurement process, the signing of the form was itself a governmental decision subject to the Act's conflict of interest restrictions. (*Cox Advice Letter* (1-87-025); *Scanlon Advice Letter* (A-92-549); *Self Advice Letter* (1-11-042).) However, as the caselaw cited above established, being a required step in the procurement process does not automatically cause that step to be a "governmental decision." Here, the CTR analyzed the HP products requested for purchase to ensure they were consistent with DGS's policies and SAM's security requirements. (Finding 12.) Respondent's sole task was to confirm the CTR had signed the form before signing the form himself. (Finding 16.)

Moreover, complainant's assertion that a signed Form-DMC was a necessary prerequisite to complete the IT procurement is itself questionable. As Funk testified, he has been requested to sign Form-DMC's after-the-fact so that the paperwork conforms to what was already purchased. (Finding 15.) If the Form-DMC can be signed by the CIO/CTO after the procurement process is completed, it cannot be a "necessary prerequisite" to the decision-making process.


10. Complainant further argues that, by signing the Form-DMC's, respondent obligated or committed DGS to a particular course of action. The evidence does not bear this out. As set forth in Findings 18 through 20, DGS never purchased the HP Z800s which were listed on the Form-DMC's signed by respondent. Some months later, DGS purchased several HP Z820s which were not listed on the same Form-DMC's. There was no evidence presented that respondent signed a Form-DMC for the HP Z820s ultimately purchased, nor any evidence that he was consulted or participated in the decision in any way to purchase the HP Z820s. Rather, the evidence suggests that the Form-DMC's were amended by hand to reflect the final purchase amounts for each purchase order, though not to reflect the actual product purchased. These handwritten amendments were made after respondent had signed the forms, and without his consultation or knowledge. This is consistent with Funk's testimony that at times the Form-DMC's were made to conform with purchases already made. Given these facts, it is found that respondent did not obligate DGS to any particular course of action by signing the Form-DMC's.

11. When all the evidence is considered, complainant failed to establish by a preponderance of evidence that respondent violated the Act. Accordingly, no cause exists to impose an administrative penalty in this matter and the First Amended Accusation should be dismissed.

ORDER

The First Amended Accusation against George Alai is dismissed.

Dated: July 19, 2017

DocuSigned by:

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings