

1 GALENA WEST (SBN 215783)
Chief of Enforcement
2 ANGELA J. BRERETON (SBN 209972)
Senior Commission Counsel
3 **FAIR POLITICAL PRACTICES COMMISSION**
1102 Q Street, Suite 3000
4 Sacramento, CA 95811
Telephone: (916) 322-5771
5 Email: abreron@fppc.ca.gov

6 Attorneys for Complainant
Enforcement Division of the Fair Political Practices Commission
7

8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**
9 **STATE OF CALIFORNIA**
10

11 In the Matter of	) OAH No. 2016090791
	) FPPC No. 13/1135
)
13 GEORGE ALAI,	) OPENING BRIEF OF THE ENFORCEMENT
	) DIVISION OF THE FAIR POLITICAL
14	) PRACTICES COMMISSION RE: PROPOSED
	) DECISION OF ADMINISTRATIVE LAW
15 Respondent.	) JUDGE TIFFANY L. KING
)
16	) Date: October 19, 2017
17	) Time: 10:00 a.m.
	) Place: 1102 Q Street, Suite 3800
	) Sacramento, CA 95811

18
19 **I. INTRODUCTION**

20 This case was heard before Administrative Law Judge (ALJ) Tiffany L. King of the Office of
21 Administrative Hearings (OAH), on March 20 – 21, 2017, in Sacramento, California.

22 The Fair Political Practices Commission (“Commission”) was represented by Angela J. Brereton,
23 Senior Commission Counsel, Enforcement Division, and Toren Lewis, Commission Counsel,
24 Enforcement Division.

25 Respondent George Alai appeared, and he was represented by Lawrence King.

26
27 ///

1 On July 19, 2017, ALJ King issued a Proposed Decision dismissing the First Amended Accusation
2 which alleged Alai committed three violations of Section 87100 of the Political Reform Act (Act).¹

3 On July 31, 2017, the Executive Director of the Commission, caused a copy of the Proposed
4 Decision to be served on the Enforcement Division and Alai. The Proposed Decision is attached hereto as
5 Exhibit A.

6 The Enforcement Division submits this opening brief pursuant to Regulation 18361.9 and
7 respectfully recommends that the Commission reject the Proposed Decision of ALJ King, and decide the
8 case upon the record, with or without taking additional evidence. Regulation 18361.9, subdivision (b)(1)
9 gives guidance on what the Enforcement Division should include in the Opening Brief. This includes:

10 (A) Whether the facts stated in the proposed decision are consistent with the evidence
11 presented;

12 (B) Whether the proposed decision contains an accurate statement and/or application of the
13 law;

14 (C) Whether there is additional material evidence that could not, with reasonable diligence,
15 have been discovered and presented at the administrative hearing;

16 (D) Which of the dispositions provided for in Government Code section 11517 is
17 recommended by the Enforcement Division and why; and

18 (E) Any other issue the Enforcement Division determines to be relevant.²

19 ALJ King inaccurately represents some of the evidence admitted at the hearing, and ALJ King improperly
20 applied the Act's conflict of interest provisions – including the Commission's interpretations regarding
21 the ministerial exception and “intermediate decisions” – to the evidence in this matter.

22 **II. ENFORCEMENT DIVISION'S POSITION**

23 **1. Whether the facts stated in the proposed decision are consistent with the evidence
24 presented.**

25 The Enforcement Division takes issue with ALJ King's proposed decision's factual findings, as
26 follows:

27 ///

28 ¹ The Political Reform Act is contained in Government Code §§ 81000 through 91014, and all statutory references are
to this code. The regulations of the Fair Political Practices Commission are contained in §§ 18110 through 18997 of Title 2 of
the California Code of Regulations, and all regulatory references are to this source.

² 2 CCR § 18361.9, subd. (b)(1).

1 a. **ALJ King incompletely depicts Ms. Schnabel’s testimony regarding discretion.**

2 In the factual findings, ALJ King states “In signing the Form-DMC, the CIO or CTO does not
3 exercise any discretion.”³ But ALJ King presents an incomplete account of Ms. Schnabel’s testimony to
4 support this conclusion. The record shows that Kathy Schnabel was a DGS IT buyer for 15 years, and a
5 manager of DGS IT buyers for 7 years. In this capacity, Ms. Schnabel has at least 22 years of experience
6 completing and processing Form-DMCs. The record reflects that Ms. Schnabel testified that Form-DMCs
7 required the signature of the “approving authority” – high-level management positions such as the CIO,
8 CTO or DPM IV – even when the products were subject to a mandatory State procurement contract.⁴
9 Ms. Schnabel also testified that DGS Subject Matter Experts in the IT division would evaluate the products
10 requested to determine whether it fit with the DGS standards.⁵ And Ms. Schnabel testified that an analysis
11 of the products was still required when a mandatory contract was applicable, and a Form-DMC was still
12 required for the products to be purchased.⁶

13 And Ms. Schnabel, who has years of experience regarding DGS IT acquisitions policy and
14 procedure, did not testify at all regarding discretion and mandatory contracts during the hearing.
15 Ms. Schnabel confirmed that a mandatory contract would list approved products and would list the
16 mandatory vendor.⁷ But she did not testify at any point during the hearing that these traits of a mandatory
17 contract turned the signing and approving of Form-DMCs into non-discretionary acts.

18 And other documentary evidence and witness testimony – including DGS policies and procedures
19 regarding Form-DMCs and testimony of Ann Baaten, DGS IT Data Processing Manager IV (DPM IV) –
20 leads to the conclusion that signing and approving of Form-DMCs required discretion. ALJ King does not
21 address any of the other evidence in her factual findings.

22 So ALJ King’s account of Ms. Schnabel’s testimony is incomplete, and does not support ALJ
23 King’s statement regarding discretion.

24 ///

25
26 _____
27 ³ Proposed Decision, p. 5, ¶14.
28 ⁴ Hr’g Tr., Mar. 20, 2017, 53:21-54:2.
⁵ Hr’g Tr., Mar. 20, 2017, 52:8-10.
⁶ Hr’g Tr., Mar. 20, 2017, 55:13-21.
⁷ Hr’g Tr., Mar. 20, 2017, 72:6-11.

1 **b. ALJ King failed to acknowledge all relevant evidence regarding the governmental**
2 **decisions at issue.**

3 The Enforcement Division presented much evidence regarding the governmental decisions at issue
4 in this case. The Enforcement Division's documentary evidence included the Form-DMCs, the DGS
5 documents accompanying each of the Form-DMCs, DGS administrative orders (AO), policies and
6 procedures regarding Form-DMCs, and statewide IT policies in the State Administrative Manual (SAM).
7 The Enforcement Division's witnesses included Kathy Schnabel, and Ann Baaten, both current DGS
8 managers who have extensive experience working with Form-DMCs and who testified regarding their
9 personal knowledge of the DGS policies and procedures regarding Form-DMCs, including during the time
10 Alai held his management position with DGS.

11 Regarding the governmental decisions, Alai presented the Form-DMCs and some of the
12 accompanying documents, DGS procedures regarding Form-DMCs, the Enforcement Division's
13 interview summary of Marc Anderson, a DGS employee with no experience regarding Form-DMCs,
14 emails from Insight Public Sector regarding the relationship between Insight and HP, the unsigned and
15 undated duty statement for the position for which Alai was hired, and the January 3, 2017 duty statement
16 for Ann Baaten. Alai provided witness testimony regarding the governmental decisions through Alai,
17 Jeffrey Funk, formerly DGS CIO and Alai's boss, and Marc Anderson.

18 ALJ King's proposed decision cites factual findings to support her conclusion that Alai's conduct
19 was ministerial – the DGS policies and procedures showing that the CIO was required to approve Form-
20 DMCs for all purchase orders, and Alai's account that he only looked to see if the other authorized
21 personnel signed off on the Form-DMCs, as he was told to do. ALJ King also improperly cites her
22 unsupported conclusion regarding discretion identified in subsection 1.a., above.

23 But ALJ King's conclusion that Alai's conduct was ministerial is unsupported by the evidence
24 admitted at the hearing. Much of the admitted documentary evidence and witness testimony – including
25 the Form-DMCs, DGS policies and procedures regarding Form-DMCs and the testimony of Kathy
26 Schnabel and Ann Baaten – leads to the conclusion that signing and approving of Form-DMCs required
27 discretion and was not ministerial. ALJ King's proposed decision completely ignores all of the
28

1 documentary evidence and witness testimony showing Alai's actions were not ministerial, and she
2 provides no justification for doing so. The evidence upon which ALJ King relies is insufficient to support
3 her conclusion that Alai's conduct was ministerial in light of established DGS policies and procedures
4 supported by relevant, credible documentary evidence and witness testimony.

5 **2. Whether the proposed decision contains an accurate statement and/or application of**
6 **the law.**

7 The Enforcement Division takes issue with ALJ King's proposed decision's statement/application
8 of the law, as follows:

9 a. **ALJ King improperly applied the Commission's 2015 Conflicts of Interests**
10 **Regulations to this matter.**

11 In her proposed decision, ALJ King states that the April 27, 2015 changes to the Commission's
12 conflict of interest regulations were "non-substantive" and "without regulatory effect," and "the current"
13 regulations should apply to this case.⁸ ALJ King supports her conclusion quoting *Carter v. California*
14 *Dept. of Veterans Affairs*, 38 Cal. 4th 914.⁹ But the very next sentence in the *Carter* case states: "However,
15 a statute might not apply retroactively when it substantially changes the legal consequences of past actions,
16 or upsets expectations based in prior law."¹⁰

17 The changes dated April 27, 2015 were not the first or the last set of amendments to the
18 Commission's conflict of interest regulations between the time of Alai's conduct and the time the
19 Accusation was filed in this matter. In April 2013, with the memorandum identified by ALJ King,¹¹ the
20 Commission began its conflict of interest regulations revision project. The proposed amendments with the
21 memorandum, while approved by the Commission at that time, were not enacted until over two years later
22 when the revision project concluded with regulations enacted July 10, 2015 and July 22, 2015. During
23 that interval, the Commission's conflict of interest regulations changed 14 times. The revision project
24 made some changes to the conflict of interest analysis which were quite substantive and dramatically
25

26 ⁸ Proposed Decision, p. 7, ¶3.

27 ⁹ *Ibid.*

28 ¹⁰ *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal. 4th 914, 922, citing *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, and *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269.

¹¹ Proposed Decision, p. 7, ¶3.

1 different than previous interpretations of Sections 87100 and 87103. It would be unfair to any public
2 official, including Alai, for the Commission to apply the current law to his past conduct. In her proposed
3 decision, ALJ King improperly applied the current conflict of interest regulations, and should have applied
4 the regulations in effect at the time of Alai's conduct.

5 **b. ALJ King improperly applied the ministerial exception of the Act's conflicts of**
6 **interests provisions to the facts of this case.**

7 The Act includes an exception to making governmental decisions for actions "that are solely
8 ministerial, secretarial, manual or clerical."¹² ALJ King concluded that Alai's approvals of Form-DMCs
9 were ministerial actions because he was acting in obedience to instructions from Jeffrey Funk, his boss.¹³
10 But the Commission, as well as long-standing rules of statutory interpretation,¹⁴ narrowly construes the
11 ministerial exception,¹⁵ and ALJ King's analysis does not reflect the Commission's long-standing narrow
12 application of the ministerial exception.

13 ALJ King's proposed decision cites Commission advice letters and California appellate court cases
14 to support her conclusions that Alai acted with no discretion and his actions were ministerial because he
15 was told to sign the Form-DMC as long as the other signature was already on it.¹⁶ But the advice letters
16 and case law show that statutory and regulatory action is required to set the "clear objective criteria," not
17 merely a supervisor's instructions, for the Act's exception to apply. In the *Torrance* Advice Letters, a Simi
18 Valley City Council written resolution set forth specific criteria for the public official to follow.¹⁷ In
19 *Ortega v. Sacramento County Dept. of Health & Human Services*, the court found that the California
20 Government Code and regulations of the Department of Social Services imposed discretionary duties upon
21 the defendants to conduct an investigation and determine the potential risk of returning a minor to her
22 parent, the defendants complied with those discretionary duties, and the defendants' discretionary actions

23 _____
24 ¹² 2 CCR § 18702.4(a)(1) [Official Notice No. 49].

¹³ Proposed Decision, p. 9, ¶8.

25 ¹⁴ *City and County of San Francisco v. Ballard* (2006) 136 Cal. App. 4th 381, 400 ["Exceptions to the general
26 provisions of a statute are to be narrowly construed"], citing *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16
27 Cal.App.4th 1005, 1017 ["One seeking to be excluded from the sweep of the general statute must establish that the exception
28 applies"], citing *Da Vinci Group v. San Francisco Residential Rent etc. Bd.* (1992) 5 Cal.App.4th 24, 28, quoting *Barnes v.*
Chamberlain (1983) 147 Cal.App.3d 762, 767.

¹⁵ *Torrance* Advice Letter (A-94-043) [Official Notice No. 59].

¹⁶ Proposed Decision, p. 5, ¶16.

¹⁷ *Torrance* Advice Letters, A-94-043 and A-94-043a [Official Notice No. 59, See p. 068].

1 were immune to civil liability even though the investigation was “lousy.”¹⁸ And in *Myers v. Patterson*,
2 the California Elections Code required each section of a petition for a ballot measure to include a copy of
3 the notice of intention and statement, and the city registrar had a ministerial duty to reject any petition that
4 did not follow this statutory procedural requirement.¹⁹ In *Vargas v. Balz*, the California Elections Code
5 dictated procedural requirements for the signature page of ballot measure petition, and the city clerk had
6 a ministerial duty to reject any petition that did not follow these statutory procedural requirements – she
7 did not have authority to change the form to meet the procedural requirements.²⁰ And in *Lazan v. City of*
8 *Riverside* (2006) 140 Cal.App.4th 453, the California Government Code imposed a duty upon the County
9 of Riverside to apply for disability retirement for its disabled employee.²¹ The *Lazan* court acknowledged
10 that ministerial acts require that the public official act in “a prescribed manner in obedience to the mandate
11 of legal authority” such as statutes and ordinances.²²

12 The situation in this case is much different than the advice letters and case law upon which ALJ
13 King relies. Alai was not mandated by statute or regulation to only sign if the other signatures were on the
14 Justification Form-DMCs. These were merely his supervisor’s instructions. A supervisor’s instructions
15 are not equal to a statutory or regulatory mandate, and do not turn a managerial, discretionary act into a
16 ministerial one.

17 Even accepting only the facts noted by ALJ King regarding this issue, Factual Finding Number 11
18 states that the Form-DMC is “intended to ensure that the requested IT products are consistent with
19 statewide [and DGS] IT policies and standards” and is used as a process to replace “a resource and time-
20 consuming process” of a Feasibility Study Report, that would otherwise be required.²³ This being the case,
21 Funk’s instruction to skim over the required duties of the position does not make that duty disappear. The
22 confusion seems to be that even though the *duty* is to ensure the policies and standards are met, the *activity*
23 was performed at a substandard level without due diligence, so ALJ King mistakenly concluded that this
24 eliminated it as a governmental decision altogether since it was performed in a haphazard way. ALJ King

25 _____
18 *Ortega v. Sacramento County Dept. of Health & Human Services* (2008) 161 Cal.App.4th 713, 714 and 728.

19 *Myers v. Patterson* (1987) 196 Cal.App.3d 130, 136.

20 *Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1556.

21 *Lazan v. City of Riverside* (2006) 140 Cal.App.4th 453, 460.

22 *Ibid*, citing *Rodriguez v. Solis* (1991) Cal.App.4th 495, 504-505.

23 Proposed Decision, p. 4. ¶11.

1 concludes that even though it is agreed (Factual Finding Number 16) that the duty was delegated to Alai
2 from Funk, this duty, as written in the DGS manual and other internal documents, was somehow changed
3 by Funk's testimony that he told Alai that he could approve the Form-DMCs without applying due
4 diligence. ALJ King's conclusion is mistaken since, as in the *Ortega* case, above, a governmental decision
5 is still made whether or not the proper amount of thought has gone into the making of it.²⁴ In Funk's place,
6 Alai had the final approval on the Justification Form-DMCs. And Mr. Funk's instructions to Alai to only
7 look for the other signatures on the Justification Form-DMCs did not change the nature of the delegated
8 discretionary action taken by Alai.

9 No statutory or regulatory authority established clear objective criteria for Alai to follow. Mr. Funk
10 instructions were not statutory or regulatory authority and were insufficient to support application of the
11 Act's exception for ministerial acts. ALJ King's conclusion that Alai's actions were ministerial improperly
12 applies the ministerial exception to Alai's actions and does not reflect the Commission's long-standing
13 narrow application of the ministerial exception.

14 **c. ALJ King's conclusion regarding "intermediate decisions" is not supported by the**
15 **evidence.**

16 ALJ King concludes that a signed Form-DMC is not a "necessary prerequisite" to complete the IT
17 procurement process.²⁵ She bases her conclusion on Funk's glib testimony that he signed Form-DMCs
18 after-the-fact to match the paperwork to the purchase.²⁶ ALJ King ignores all of the other documentary
19 evidence and witness testimony showing that the Form-DMCs were "intermediate decisions" and
20 "necessary prerequisites" to complete IT procurements. But the overwhelming evidence in the case
21 contradicts Funk's testimony. Indeed, even Funk's testimony shows that the Form-DMCs were "necessary
22 prerequisites," otherwise, why bother to go back and make sure the paper trail matches up. And, as ALJ
23 King clearly states in Factual Finding Number 12, the Form-DMC itself supports its importance as a
24 required step since it contains a very detailed conflict of interest check for the signer to perform before
25 signing.²⁷ Ministerial and insignificant decisions don't require that. So the evidence upon which ALJ King

26 ²⁴ *Ortega v. Sacramento County Dept. of Health & Human Services* (2008) 161 Cal.App.4th 713, 714 and 728.

27 ²⁵ Proposed Decision, p. 9, ¶9.

28 ²⁶ *Ibid.*; Also see Hr'g Tr., Mar. 21, 2017, 108:11-14.

²⁷ Proposed Decision, p. 4, ¶12.

1 relies is insufficient to support her conclusion that a signed Form-DMC is not a “necessary prerequisite”
2 in light of established DGS policies and procedures supported by relevant, credible documentary evidence
3 and witness testimony.

4 **d. ALJ King improperly gives weight to the end result of the purchase orders.**

5 ALJ King concludes that Alai’s signatures on the Form-DMCs did not obligate or commit DGS to
6 any course of action because the products identified were not the products actually purchased.²⁸ But this
7 issue is a red herring. The Act does not require that Alai’s governmental decisions had actual material
8 financial effects. The law only requires reasonably foreseeable material financial effects at the time the
9 decisions were made. So whether or not the products were actually purchased has no bearing on whether
10 Alai obligated or committed DGS to a course of action, which in this case was to move forward with the
11 procurement process. ALJ King improperly gives weight to these facts.

12 **3. Whether there is additional material evidence that could not, with reasonable**
13 **diligence, have been discovered and presented at the administrative hearing.**

14 No such evidence is known to exist.

15 **4. Which of the dispositions provided for in Government Code section 11517 is**
16 **recommended by the Enforcement Division and why.**

17 Government Code section 11517, subdivision (c)(2), provides that within 100 days of the
18 Commission’s receipt of the proposed decision, the Commission may do any of the following:

- 19
- 20 • Adopt the proposed decision in its entirety.
 - 21 • Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed
22 decision.
 - 23 • Make technical or other minor changes in the proposed decision and adopt it as the decision.
24 However, action by the Commission in this regard is limited to “a clarifying change or a
25 change of a similar nature that does not affect the factual or legal basis of the proposed
26 decision.”
 - 27 • Reject the proposed decision and refer the case back to the ALJ to take additional evidence
28 and prepare a revised, proposed decision.
 - Reject the proposed decision, and decide the case upon the record, including the transcript,
or upon an agreed statement of the parties, with or without taking additional evidence. (By
stipulation of the parties, the Commission may decide the case upon the record without

²⁸ Proposed Decision, p. 9, ¶10.

1 including the transcript.) If the Commission chooses this option, all of the following
2 provisions apply:

3 (i) A copy of the record shall be made available to the parties.

4 (ii) The Commission shall not decide the case without affording the parties the
5 opportunity to present either oral or written argument. If additional oral evidence (as
6 opposed to argument) is introduced before the Commission, no Commission member
7 may vote unless the member heard the additional oral evidence, but the Commission
8 has discretion as to whether or not additional oral evidence will be allowed to be
9 presented.

10 (iii) The authority of the Commission to decide the case in this regard includes the
11 authority to decide some or all of the issues in the case.

12 (iv) The Commission must issue its final decision not later than 100 days after
13 rejection of the proposed decision (subject to an extension of time related to ordering a
14 transcript of the hearing). If the Commission finds that a further delay is required by
15 special circumstance, it shall issue an order delaying the decision for no more than 30
16 days and specifying the reasons therefor.²⁹

17 In this case, the Enforcement Division recommends that the Commission reject the proposed
18 decision, and decide the case upon the record, including the transcript, either with or without taking
19 additional evidence.

20 The public harm with respect to conflict of interest violations is that they erode public confidence
21 in our public officials' ability to make unbiased decisions. For this reason, violations involving conflicts
22 of interests are some of the most serious violations of the Political Reform Act, and it does not appear that
23 ALJ King's proposed decision gave this matter the level of consideration that it deserves.

24 The Commission may request that the Legal Division review the record for the purpose of drafting
25 a final, written decision to be submitted to the Commission for its consideration. This is the course of
26 action that the Enforcement Division recommends, and if the Commission agrees, the parties will have an
27 opportunity to make argument to the Legal Division based upon specific citations to the record. In such
28 case, the Enforcement Division is prepared to argue in favor of a penalty of up to \$5,000 per violation.

5. Any other issue the Enforcement Division determines to be relevant.

Alai was second-in-command of a very large department within a very large agency, and Alai's
official position required an enormous amount of responsibility and accountability over a \$12 million
budget for state personnel and state resources. Alai was a former executive with HP, having worked for

²⁹ § 11517, subd. (c)(2).

1 the company for over 30 years.³⁰ Alai traveled the globe marketing HP products and services.³¹ He was
2 hired, as a first-time state employee, to be the second-in-command of DGS IT because of his “knowledge
3 of processes and operations” and to “bring transparency and accountability” to the DGS ITSD.³² And yet,
4 Alai did not apply transparency and accountability to his own governmental decisions, arguing that his
5 governmental decisions were insignificant.

6 ALJ King’s proposed decision ignores credible evidence admitted at the hearing, includes Factual
7 Findings which are unsupported by the evidence cited, and makes incorrect Legal Conclusions. The
8 Commission should reject ALJ King’s proposed decision and decide the case upon the record.

9 **III. CONCLUSION**

10 For the foregoing reasons, it is respectfully submitted that the Commission should reject the
11 proposed decision, and decide the case upon the record, including the transcript, either with or without
12 taking additional evidence. If the Commission agrees, the Enforcement Division is prepared to argue in
13 favor of a penalty of up to \$5,000 for each violation.

14 Dated: August 14, 2017

FAIR POLITICAL PRACTICES COMMISSION

By: Galena West
Chief of Enforcement

15
16
17 

18
19

Angela J. Brereton
Senior Commission Counsel

20
21
22
23
24
25
26
27

³⁰ Hr’g Tr., Mar. 21, 2017, 104:22-105:4.

³¹ Hr’g Tr., Mar. 21, 2017, 129:9-21.

28 ³² Ex. 21, FPPC 0355; Hr’g Tr., Mar. 21, 2017, 116:15-16.

EXHIBIT A

OPENING BRIEF OF THE ENFORCEMENT DIVISION RE: PROPOSED DECISION OF ALJ

In the Matter of George Alai
OAH NO. 2016090791; FPPC NO. 13/1135



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

July 31, 2017

Via Mail and Electronic Mail

Lawrence King
Attorney at Law
Law Offices of Lawrence J. King
11 Western Avenue
Petaluma, CA 94952
kingsq@pacbell.net
Attorney for Respondent

Ms. Angela J. Brereton
Senior Commission Counsel
Fair Political Practices Commission
abrereton@fppc.ca.gov
Attorney for Complainant

Re: *In the Matter of George Alai*
FPPC Case Number: 13/1135
OAH Number: 201609791

Dear Mr. King and Ms. Brereton:

Enclosed please find the Proposed Decision issued by the Administrative Law Judge in the above-referenced matter. The Commission will consider the Proposed Decision at its regularly-scheduled meeting on **Thursday, September 21, 2017**. For your reference, I am including Commission Regulation 18361.9, which details the procedures and deadlines for submitting briefs for the Commission to consider.

If you have any questions, please contact me at (916) 322-5745.

Sincerely,

Erin V. Peth
Executive Director

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

**§ 18361.9. Briefing Procedure of Proposed Decision by an Administrative Law Judge;
Reconsideration.**

(a) Service of Process.

Within 14 days of receipt of a proposed decision by an administrative law judge following a hearing held pursuant to Government Code section 83116, the Executive Director shall serve a copy of the proposed decision on the Commission's Enforcement Division and the respondent(s). The Executive Director shall include notification of the date, time and place the matter will be heard by the Commission.

(b) Briefing Procedure.

(1) No later than 14 days after the date of service of the proposed decision, the Enforcement Division shall file an opening brief. The Enforcement Division shall file the original of the opening brief, with proof of service attached, and six copies with the Executive Director of the Commission. The Enforcement Division shall serve a copy of the brief, with proof of service, on the respondent. The opening brief may address the following:

(A) Whether the facts stated in the proposed decision are consistent with the evidence presented;

(B) Whether the proposed decision contains an accurate statement and/or application of the law;

(C) Whether there is additional material evidence that could not, with reasonable diligence, have been discovered and presented at the administrative hearing;

(D) Which of the dispositions provided for in Government Code section 11517 is

recommended by the Enforcement Division and why; and

(E) Any other issue the Enforcement Division determines to be relevant.

(2) No later than 14 days after the date of service of the Enforcement Division's opening brief, the respondent may file a response brief. The respondent shall file the original of the response brief, with proof of service attached, and six copies with the Executive Director of the Commission. The respondent shall serve a copy of the response brief, with proof of service, on the Enforcement Division.

(3) No later than 14 days after the date of service of the respondent's brief, the Enforcement Division may file a reply brief. The Enforcement Division shall file the original of the reply brief, with proof of service attached, and six copies with the Executive Director of the Commission. The Enforcement Division shall serve a copy of that reply brief, with proof of service, on the respondent.

(4) The Executive Director may, for good cause, extend the time requirements set forth in this subdivision.

(5) After receipt of all of the briefs, the Executive Director shall submit a copy of each brief to each Commissioner in a timely manner.

(c) Petitions for Reconsideration.

(1) Any party to the proceeding may petition the Commission for reconsideration within 15 days of service of the decision. The petition shall be served on all parties of record. A petition shall be deemed filed with the Commission on the date indicated on the proof of service; or, if there is no proof of service, the postmark date or date; of hand delivery to the Commission's office.

(2) The petition shall set forth in full detail the issues to be considered by the

Commission and contain specific references to the record and applicable principles of law. The petition shall be based upon one or both of the following grounds:

(A) The petitioner has discovered new material evidence that the petitioner could not, with reasonable diligence, have discovered and produced at the administrative hearing;

(B) The decision contains prejudicial errors of law or fact.

(3) An opposing party may file an answer within 10 days of service of a petition for reconsideration. The answer shall be served on all parties of record.

(4) A petition for reconsideration is deemed denied unless it is granted or denied in writing no later than 30 days after service of the Commission's decision. The Commission may extend the time for considering a petition for up to 10 days.

(5) The Chairperson or the Executive Director may grant or deny a petition for reconsideration or extend the time in which to consider the petition.

(6) If the petition is granted, the case shall be assigned to the full Commission or to an administrative law judge, either of whom may order the taking of additional evidence, or may affirm, rescind, alter or amend the decision on the basis of the record previously submitted. The decision after reconsideration shall be in writing and shall specify the reasons for the decision. If assigned to an administrative law judge, the decision is a proposed decision subject to the procedure set forth in Government Code section 11517.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 83108 and 83116, Government Code.

HISTORY

1. Renumbering and amendment of former section 18361.5 to new section 18361.9 filed 10-26-2004; operative 11-25-2004 (Register 2004, No. 44).

FPPC No. 13/1135, In the matter of George Alai, OAH Number: 201609791

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 1102 Q Street, Suite 3000, Sacramento, CA 95811. On the date below, I served the following document:

PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE

MANNER OF SERVICE

(U.S. Mail) By causing a true copy thereof to be served on the parties in this action through the U.S. Mail and addressed as listed below. I am familiar with the procedure of the Fair Political Practices Commission for collection and processing of correspondence for mailing with the United States Postal Service, and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

SERVICE LIST

Lawrence King
Attorney at Law
Law Offices of Lawrence J. King
11 Western Avenue
Petaluma, CA 94952
Attorney for Respondent

(By Electronic Mail)
kingsq@pacbell.net

(By Personal Service) On Monday, July 31, 2017, at approximately 4:45 p.m., I personally served:

Angela Brererton, Senior Commission Counsel, at 1102 Q Street, Suite 3000, Sacramento, CA 95811.
Attorney for Complainant

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this document is executed at Sacramento, California, on July 31, 2017.



Sheva Tabatabaiejad



OFFICE OF ADMINISTRATIVE HEARINGS

State of California

GENERAL JURISDICTION DIVISION

2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833
(916) 263-0550 phone / (916) 376-0554 fax
www.dgs.ca.gov/OAH

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
OAH 60 (Rev. 04/09)

Regional Offices

Los Angeles
320 West Fourth Street
Suite 630
Los Angeles, CA 90013
(213) 576-7200
(916) 376-6324 fax

Oakland
1515 Clay Street
Suite 206
Oakland, CA 94612
(510) 622-2722
(916) 376-6323 fax

San Diego
1350 Front Street
Suite 6022
San Diego, CA 92101
(619) 525-4475
(916) 376-6325 fax

Van Nuys
15350 Sherman Way
Suite 300
Van Nuys, CA 91406
(818) 904-2383
(916) 376-6319 fax

**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

///

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.

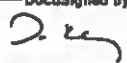
10. Complainant further argues that, by signing the Form-DMC's, respondent obligated or committed DGS to a particular course of action. The evidence does not bear this out. As set forth in Findings 18 through 20, DGS never purchased the HP Z800s which were listed on the Form-DMC's signed by respondent. 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:

E485005DE8FE48C

TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is Fair Political Practices Commission, 1102 Q Street, Suite 3000, Sacramento, California 95811. On August 14, 2017, I served the following document(s):

1. OAH NO. 2016090791; FPPC Case No. 13/1135 – OPENING BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR POLITICAL PRACTICES COMMISSION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE TIFFANY L. KING;

By Personal Delivery. I personally delivered the document(s) listed above to the person(s) at the address(es) as shown on the service list below.

By email or electronic transmission. I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail in Sacramento County, California.

SERVICE LIST

Personal and Email Delivery

Sasha Linker
Commission Assistant
Fair Political Practices Commission
1102 Q Street, Ste 3000
Sacramento, CA 95811

slinker@fppc.ca.gov

Email Delivery

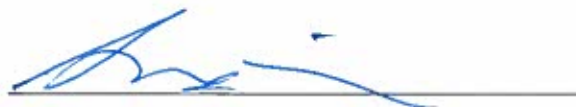
Lawrence J. King
The Law Office of Lawrence J. King
o/b/o George Alai

kingsq@pacbell.net

Courtesy Copy via US Mail

11 Western Avenue
Petaluma, CA 94952

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 14, 2017.



Sara Wilson