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FAIR POLITICAL PRACTICES COMMISSION
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11 **THE FAIR POLITICAL PRACTICES COMMISSION**

12 **STATE OF CALIFORNIA**

13 **IN THE MATTER OF:**

14 **GEORGE ALAI,**

15 **RESPONDENT.**

OAH NO. 2016090791
Enforcement Division CASE NO. 13/1135

RESPONDENT GEORGE ALAI'S
BRIEF IN SUPPORT OF THE
PROPOSED DECISION OF THE
ADMINISTRATIVE LAW JUDGE
TIFFANY KING

Hearing Date: October 19, 2017
Time: 10:00 a.m.
Place: 1102 Q Street, Suite 3800
Sacramento, CA 95811

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19 **INTRODUCTION**

20 The Enforcement Division of the Fair Political Practices Commission ("the Complainant"
21 or "the Enforcement Division") issued a formal accusation against George Alai ("Respondent" or
22 "Alai"), the former Chief Technology Officer ("CTO") for the California Department of General
23 Services ("DGS"). In its formal accusation that was the subject of the hearing in this matter, the
24 Enforcement Division accused Alai of violating the conflict of interest provisions of the
25 California Political Reform Act ("the Act") by signing three Desktop & Mobile Computing
26 Justification Forms ("Form-DMC") "*obligating DGS to complete the purchase orders*" for a
27 total of 15 Hewlett Packard ("HP") Z820 workstations at a time when he owned over \$25,000 in
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1 Hewlett Packard (“HP”) stock. After the hearing was concluded, the Enforcement Division
2 amended the formal accusation to state that Alai had signed three Form-DMCs “obligating DGS
3 to complete the purchase orders” for a total of 10 HP Z800 workstations and 5 HP Z820
4 workstations.

5 Administrative Law Judge (“ALJ”) Tiffany L. King of the Office of Administrative
6 Hearings conducted the hearing in this matter. After having the benefit of personally observing
7 each of the witnesses and reviewing all the evidence presented during the hearing, ALJ King
8 concluded that: **“When all the evidence is considered, complainant failed to establish by a
9 preponderance of the evidence that respondent violated the Act.”**

10 Regarding Counts 1 & 2, ALJ King found that DGS had not purchased the Z800 HP
11 workstations for which the Enforcement Division accused Alai of “obligating DGS to complete
12 the purchase orders.” ALJ King further found that there was no evidence that Alai signed a
13 Form-DMC obligating DGS to complete the purchase orders for the 10 HP Z820 workstations
14 DGS in fact purchased.

15 Regarding Count 3, ALJ King found that there was no evidence in the record to establish
16 respondent signed the Form-DMC that was the basis for Count 3. ALJ King noted during the
17 hearing that the Enforcement Division’s own investigator cast doubt on whether the signature on
18 the Form-DMC that was the basis of Count 3 was Alai’s signature and that none of the signatures
19 on the Form-DMCs were similar enough for a layperson to confirm they were signed by Alai.
20 ALJ King explained that the type of analysis necessary to establish whether or not Alai had
21 signed the Form-DMC that was the basis for Count 3 was appropriate for an expert witness, but
22 not a layperson. The Enforcement Division failed to present the testimony of a handwriting
23 expert or request a continuance to retain a handwriting expert. Finally, the Enforcement Division
24 acknowledges in its brief to this Commission that it does not know of any additional material
25 evidence that could not, with reasonable diligence, have been discovered and presented at the
26 administrative hearing.

27 Regarding all three counts, ALJ King found that when Alai signed Form-DMCs, he was
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1 merely performing a “ministerial act,” which is expressly exempt from the Act’s conflict of
2 interest provisions. ALJ King based this conclusion on the uncontested testimony of both Kathy
3 Schnabel and Ann Baaten, two of the Enforcement Division’s witnesses, as well as the testimony
4 of Jeffrey Funk (“Funk”), the DGS Chief Information Officer (“CIO”). All three testified that
5 the when the CIO, either Funk or his successor, or their designee, either Baaten or Alai, signed a
6 Form-DMC, they were confirming that the DGS’s Chief of Technology Resources (“CTR”) had
7 signed the Form-DMC attesting that the DGS “subject matter experts,” had determined that the
8 products to be purchased met the State and DGS’s standards and the SAM security requirements.
9 If the products to be purchased met the “clear and objective standards” set forth in the State and
10 DGS’s standards and the SAM security requirements, Funk or his successor, or their designees,
11 Alai or Baaten, had no choice but to sign the Form-DMC and forwarded it to the purchasing
12 department to be processed. That is the essence of a “ministerial duty.”

13 In its opening brief to this Commission, the Enforcement Division fails to demonstrate
14 that ALJ King did not properly consider the evidence or misapplied the relevant law. In fact,
15 ALJ’s decision is supported by overwhelming evidence and is consistent with the proper
16 application of the Act and this Commission’s regulations and decisions interpreting the Act.

17 **ALJ King’s Decision**

18 ALJ King made twenty-one Factual Findings, all well supported by the record. Her
19 Factual Findings included the following.

20 During his employment interview, Alai was assured he would not be performing any
21 procurement activities as the CTO. His duty statement did not include any procurement duties
22 and did not state that his position was a designated position in the DGS Conflict of Interest Code
23 for which a Statement of Economic Interests (Form 700) was necessary. Nor was the Data
24 Processing Manager IV position, or CTO job title, designated in DGS's Conflict of Interest Code
25 as one requiring a Form 700 be filed.¹ Nor did DGS provide Alai any training concerning the
26 State's conflict of interest rules or the Political Reform Act.²

27 ¹ Factual Finding 5, pg. 3.

28 ² Factual Finding 8, pg. 3.

1 In order to sell products to California state agencies, in 2009 HP partnered with Western
2 Blue Corporation (Western Blue) and Insight Public Sector (Insight) as Joint Prime Contract
3 Holders under a mandatory contract called a Leveraged Procurement Agreement (LPA).³
4 Because the LPA was a mandatory contract for HP products, there was no solicitation for bids. If
5 a state agency wanted to purchase HP products, the products had to be purchased from the
6 vendor listed in the mandatory contract, in this case Western Blue/Insight/HP. Accordingly, it
7 was not possible for Alai, as DGS's CTO, to influence or direct from which vendor HP products
8 would be purchased. All procurements were automatically directed to Western Blue/Insight/HP.⁴

9 To be processed, every purchase order for IT products required a completed and
10 approved Form-DMC. The Form-DMC must be signed by the DGS Chief of Office of
11 Technology Resources (CTR), followed by the DGS Chief Information Officer ("CIO"). The
12 Form-DMC is an internal DGS form intended to ensure that the requested IT products are
13 consistent with statewide IT policies and standards as well as with DGS's IT policies and
14 standards.⁵ The CTR signature on the form attests to the following:

15 I have reviewed the proposed use of this desktop and/or mobile
16 computing configuration or product and have determined the use to be
17 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.⁶

18 Funk instructed Alai to sign any Form-DMC that arrived in Funk's absence if it had been
19 signed by the CTR. Funk told Alai that the CTR's signature meant that his office had looked up
20 the requested product and ensured that it was on a list of approved products in the LPA. Funk did
21 not authorize Alai to do any independent analysis or investigation. Funk's instructions were
22 clear: if the CTR signed the Form-DMC, then Alai was to sign it; if the CTR had not signed the
23 form, Alai was not to sign it but to return it to the Office of Technology Resources.⁷

24 ³ Factual Finding 9, pg. 3.

25 ⁴ Factual Finding 10, pg. 4.

26 ⁵ Factual Finding 11, pg. 4.

27 ⁶ Factual Finding 11, pg. 4.

28 ⁷ Factual Finding 16, pg. 5.

1 The Enforcement Division's witness, Kathleen Schnabel, testified that when there is a
2 mandatory contract, as in this case, which dictates a specific brand of workstations that can be
3 purchased, the CIO's, or in his absence the CTO's, review of the Form-DMC would be a
4 "cursory review."⁸ Likewise, Alai's supervisor, the DGS CIO Jeffrey Funk, also testified that the
5 CIO's signature on the Form-DMC was a "very routine activity."⁹

6 On November 20, 2012, Alai signed two Form-DMC's for the total purchase of 10 HP
7 Z800 HP workstations.¹⁰ DGS never purchased any of the HP Z800 workstations listed on the
8 two Form-DMC's signed by Alai, as the HP Z800 had been discontinued by HP. Rather, in early
9 2013, months after Alai signed the two Form-DMC's for the *HP Z800* workstations, DGS
10 obtained new quotes for *HP Z820* workstations. Alai never reviewed or signed any Form-
11 DMC's for the ten HP Z820 workstations that DGS did purchase.¹¹

12 In June, 2013, a third purchase order was submitted for the purchase of five HP Z820
13 workstations. On June 9, 2013, the corresponding Form-DMC was signed. However, there was
14 no evidence in the record to establish Alai signed the form.¹²

15 Based upon her twenty-one factual findings, ALJ King concluded that Alai's acts of
16 signing the two Form-DMC's that he did sign were purely ministerial, and did not constitute
17 "making a governmental decision" because Alai exercised no discretion or judgment in doing so.
18 Following Funk's instructions, he merely reviewed the forms to ensure they had been signed by
19 the CTR and, having confirmed this requirement was met, signed each form.¹³

20 ALJ King went on to note that "being a required step in the procurement process does not
21 automatically cause that step to be a 'governmental decision.'" She noted that "the CTR analyzed
22 the HP products requested for purchase to ensure they were consistent with DGS's policies and
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24 ⁸ Factual Finding 14, pg. 5.

25 ⁹ Factual Finding 16, pg. 5.

26 ¹⁰ Factual Finding 18, pg. 5.

27 ¹¹ Factual Finding 20, pg. 6.

28 ¹² Factual Finding 21, pg. 6.

¹³ Legal Conclusion 8, pg. 9.

1 SAM's security requirements. (Factual Finding 12.) Respondent's sole task was to confirm that
2 the CTR had signed the form before signing the form himself. (Factual Finding 16.)"¹⁴

3 She further noted that the Enforcement Division's assertion that a signed Form-DMC was
4 a "necessary prerequisite" to complete the IT procurement is itself questionable in light of
5 "Funk's testimony that he has been requested to sign Form-DMC's after-the-fact so that the
6 paperwork conforms to what was already purchased. If the Form-DMC can be signed by the
7 CIO/CTO after the procurement process is completed, it cannot be a 'necessary prerequisite' to
8 the decision-making process."¹⁵

9 Finally, ALJ King rejected the Enforcement Division's argument that, by signing the
10 Form-DMC's he did sign, Alai obligated or committed DGS to a particular course of action. She
11 noted that, "DGS never purchased the HP Z800s, which were listed on the Form-DMC's signed
12 by Alai. Some months later, DGS purchased several HP Z820s, which were not listed on the
13 same Form-DMC's. There was no evidence presented that Alai signed a Form-DMC for the HP
14 Z820s ultimately purchased, nor any evidence that he was consulted or participated in the
15 decision in any way to purchase the HP Z820s."¹⁶ Given these and other facts, ALJ King found
16 that respondent did not obligate DGS to any particular course of action by signing the Form-
17 DMC's.¹⁷

18 Accordingly, ALJ King concluded that: "when all the evidence is considered, the
19 Enforcement Division failed to establish by a preponderance of evidence that Alai violated the
20 Act. Therefore, no cause exists to impose an administrative penalty in this matter and the First
21 Amended Accusation should be dismissed."¹⁸

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25 ¹⁴ Legal Conclusion 9, pg. 9.

26 ¹⁵ Legal Conclusion 9, pg. 9.

27 ¹⁶ Legal Conclusion 10, pg. 9.

28 ¹⁷ Legal Conclusion 10, pg. 9

¹⁸ Legal Conclusion 11, pg. 9.

THE ENFORCEMENT DIVISION'S POSITION

1. Whether the facts stated in the Proposed Decision are consistent with the evidence presented.

The Enforcement Division takes issue with the factual findings in ALJ King's proposed decision on two grounds, but neither are supported by the record or constitute grounds to reject ALJ King's decision in this case.

a. Kathy Schnabel's testimony supports ALJ King's conclusion that when signing Form-DMC's Alai did not exercise any discretion.

The Enforcement Division argues that ALJ King presents an incomplete account of Ms. Schnabel's testimony to support the conclusion that: "In signing the Form-DMC, the CIO or CTO does not exercise any discretion." In fact, however, Ms. Schnabel's *full* testimony was consistent with the testimony of both Funk and Ann Baaten ("Baaten").¹⁹ As discussed more fully below, both Funk and Baaten testified that when they signed the Form-DMC they were confirming that the CTR had signed the Form-DMC attesting to the fact that the "subject matter experts" ("SMEs") who reported to the CTR had determined that the IT products being purchased comply with State and DGS IT standards and SAM security requirements.²⁰ Moreover, the evidence at the hearing supports ALJ King's conclusion that once it was determined by the SME's reporting to the CTR that the requested workstations complied with State and DGS IT standards and security requirements, Alai, as the CIO's designee, had no discretion to sign it or not, nor authority to change the order. If it was signed by the CTR he was to sign it; if the CTR had not signed it, he was to send it back; and he had no authority to change the order.²¹

b. The Enforcement Division fails to identify any evidence in the record that ALJ King did not consider that does not support her decision.

The Enforcement Division argues that:

Much of the admitted documentary evidence and witness

¹⁹ Baaten was the other witness that the Enforcement Division called who signed Form-DMC's as a regular part of her duties.

²⁰ 3/20/2017 Hearing Transcript ("Tr.") 52:6-15; 3/21/2017 88:23-89:7; 3/21/2017 Tr. 87:22-24; 3/21/2017 Tr. 18:9-13.

²¹ 3/21/2017 Tr. 87:9-16; 3/21/2017 Tr. 88:10-14; 3/21/2017 Tr. 88:15-17.

1 testimony – including the Form-DMCs, DGS policies and
2 procedures regarding Form-DMCs and the testimony of Kathy
3 Schnabel and Ann Baaten – leads to the conclusion that signing
4 and approving of Form-DMCs required discretion and was not
ministerial. ALJ King’s proposed decision completely ignores all
of the documentary evidence and witness testimony showing
Alai’s actions were not ministerial, and she provides no
justification for doing so.

5 However, the Enforcement Division cites no specific evidence, no language in DGS policies and
6 procedures regarding Form-DMCs, nor any actual testimony of Kathy Schnabel and Ann Baaten,
7 that ALJ King failed to consider or that would contradict her conclusion that once the CTR
8 signed the Form-DMC confirming that the products being purchased met the State and DGS
9 standard and security requirements Alai had no discretion to change what was being ordered or
10 to refuse to sign the Form-DMC.

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

13 **a. ALJ King properly applied the Commission’s 2015
14 Conflicts of Interests Regulations to this matter.**

15 The Enforcement Division filed its Accusation against Alai on October 21, 2015. Over
16 five months earlier, on April 27, 2015, the Enforcement Division changed “without regulatory
17 effect,” CCR § 18700, “Basic Rule and Guide to Conflict of Interest Regulations,” by amending
18 the section heading and subsection (a), repealing subsections (b)-(b)(8) and adopting new
19 subsections (b)-(f). It did so under the authority of Section 83112 of the Government Code to
20 clarify the requirements of Sections 87100 and 87103 of the Government Code, which
21 themselves had not been amended.²² Accordingly, the clarifications in the section heading and
22 subsection (a) and new subsections (b)-(f) apply retroactively.²³ The current regulations make

23 ²² Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100 and 87103, Government
24 Code. Note 17: Change without regulatory effect amending section heading and subsection (a), repealing
25 subsections (b)-(b)(8) and adopting new subsections (b)-(f) filed 4-27-2015. Submitted to OAL for filing pursuant to
26 *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal,
Third Appellate District, nonpublished decision, April 27, 1992 (Enforcement Division regulations only subject to
1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by
OAL) (Register 2015, No. 18).

27 ²³ *Carter v. California Dep't of Veterans Affairs* (2006) 38 Cal. 4th 914, 922, (“A statute that merely clarifies, rather
28 than changes, existing law is properly applied to transactions predating its enactment.”).

1 clear that the Act's conflict of interest prohibitions apply "*only to governmental decisions that*
2 *have a financial effect.*"²⁴

3 The current Section 18700(b) of the Regulations of the Fair Political Practices
4 Commission, provides in relevant part:

5 (b) Application: The Act's conflict of interest prohibitions apply
6 only to public officials and *only to governmental decisions that*
7 *have a financial effect.*

8 * * *

9 (c)(4) "Governmental decision" means any action taken by a
10 government agency *that has a financial effect on any person*
11 *other than the governmental agency making the decision.*

12 (c)(5) "*Financial effect*" means an effect that provides a benefit of
13 monetary value or provides, prevents, or avoids a detriment of
14 monetary value.

15 * * *

16 Cal. Code Regs. tit. 2, § 18700 (emphasis added).

17 The evidence presented at the hearing established that the purchase orders that
18 accompanied the Form-DMCs signed by Alai that are the basis for Counts 1 & 2 were never
19 completed and the HP products that were listed in both the purchase orders attached to the Form-
20 DMCs signed by Alai were never purchased.²⁵ Accordingly, Alai signing the Form-DMCs that
21 are the basis for counts 1 & 2 *had no financial effect* on either Alai or HP and, therefore, the
22 Act's conflict of interest prohibitions do not apply.

23 This conclusion is further reinforced by the current version of section 18702, which
24 provides that "the financial effect of a governmental decision is not material if it is nominal,
25

26 ²⁴ In addition, the current regulations no longer use the six-step process relied on by the Enforcement Division.
27 Instead, it uses a simpler four-step process that does not include some of the "presumptions" relied upon by the
28 Enforcement Division.

²⁵ See 3/20/2017 Tr. 62:20-66:21, 68:20-69:18, 72:12-75:5, 75:23-78:11 (Schnabel).

1 inconsequential, or insignificant.” Since neither Alai, nor HP, received *any* financial benefit as a
2 result of the two Form-DMCs that are the basis of Counts 1 & 2, the financial effect of Alai’s
3 decision to sign those to forms is not “material” and, therefore does not constitute a violation of
4 the Act.

5 **b. ALJ King properly applied the ministerial exception to the facts of this case.**

6 Black’ Legal Dictionary defines “ministerial” as: “That which is done under the authority
7 of a superior, which involves obedience to instructions, but demands no special discretion,
8 judgment, or skill.” Likewise, in *Ortega v. Sacramento Cty. Dep’t of Health & Human Servs.*
9 (2008) 161 Cal. App. 4th 713, 728, 74 Cal. Rptr. 3d 390, 400, the court noted that actions are
10 manifestly ministerial when “they amount only to obedience to orders which leave the officer no
11 choice.” Similarly, in *Myers v. Patterson* (1987) 196 Cal. App. 3d 130, 136, 241 Cal. Rptr. 751,
12 753–54, the Court held that a city registrar performs a “ministerial function” when “ascertaining
13 whether the procedural requirements for submitting an initiative measure have been met” and
14 “has a ministerial duty to place on the ballot all initiative measures that comply with formal
15 requirements; *see Vargas v. Balz*, (2014) 223 Cal. App. 4th 1544, 1556, 168 Cal. Rptr. 3d 154,
16 163, *as modified on denial of reh’g* (Mar. 24, 2014)(“The corollary of that duty, applicable in
17 *Myers*, is that the registrar has a duty to reject a ballot measure that does not comply with the
18 formal requirements.”); *see also Wilson v. Cty. of Napa* (2017) 9 Cal. App. 5th 178, 189, 214
19 Cal. Rptr. 3d 676, 684, *as modified* (Mar. 13, 2017), *review denied* (May 24, 2017)(“ The
20 registrar has the ministerial task of placing on the ballot measures submitted in compliance with
21 the statutory requirements. *Whether a petition complies is to be determined by the registrar*
22 *based only on the face of the petition presented.*”)(emphasis added).

23 This distinction between *ministerial* and *discretionary* acts is further illustrated in *Sierra*
24 *Club v. Cty. of Sonoma* (2017) 11 Cal. App. 5th 11, a case involving a statute that has a
25 “ministerial exemption” much like the “ministerial exception” in this case. In that case, the court
26 explained:

27 Courts continue to recognize that actions by a local agency are
28 *discretionary when they require the exercise of the*

1 *administrator's subjective judgment* and are *ministerial* when
2 they are taken under regulations that allow for little or no
3 exercise of such judgment.

4 *Sierra Club, supra* 11 Cal. App. 5th at 334–35.

5 In the *Sierra Club* case, the court upheld the Commissioner's determination that issuing
6 an erosion-control permit was *ministerial*, even though the approval process required
7 determining whether the permit application complied with applicable ordinances and regulations.
8 *Id.*, at 335 (emphasis added). Even though the local officials in the *Sierra Club* case had to
9 determine for each unique project if the proposed project conformed to “a series of finely
10 detailed and very specific regulations,” the Court nonetheless held that the decision whether or
11 not to issue the permit for such projects came within the *ministerial* exemption because the local
12 officials had *no discretion to deny* the permit *if the project was in conformity with the*
13 *regulations. Id.*, at 29. The same is true in this case.

14 It is uncontested in this case that the purpose of the Justification Form-DMC was to make
15 sure that the IT products purchased comply with State and DGS IT standards and security
16 requirements. Like the “finely detailed and very specific regulations” in the *Sierra Club* case,
17 the State and DGS IT standards and security requirements provide the objective set of criteria,
18 necessary to determine whether or not the Form-DMC should be signed. If it has been
19 determined that the requested workstations meet that set of objective criteria, Alai was required
20 to sign the Form-DMC.

21 It is also uncontested that the analysis of whether or not the requested workstations
22 complied with State and DGS standards and security requirements was performed by “subject
23 matter experts” (“SMEs”) under the direction of the Chief of Technology Resources (“CTR”).
24 Ms. Schnabel testified that: “It would be routed through the SME, the Subject Matter Experts for
25 review of the technology verifying whether it was on the standards or not on the standards.”²⁶
26 Likewise, Funk testified that: “Q: So the analysis would have been done by the other two signers
27 of the document, and not Mr. Alai when he signed it on your behalf? A: Yeah.”²⁷ 3\21\17 Tr.

27 ²⁶ 3\20\2017 Tr. 52:6-15.

28 ²⁷ 3\21\2017 Tr. 87:25-88:9.

1 88:23-89:7(Funk: “Q: Does the term "SME" mean anything to you? A: Yes. Q: And would the
2 Subject Matter Experts be reporting to the Chief of Technology Resources? A: Yes. It would be
3 in the desktop group who was familiar with not only the standards of what we purchased but was
4 available through the Leveraged Procurement Agreement, and they would be the ones who
5 would be filling out the paperwork and initiating it and making sure we stay within policy.);
6 CCA at 20:1-3 (“the Chief of Technology Resources and other IT subject matter experts
7 reviewed the acquisition package before the Justification Form-DMCs went to the CIO, or his
8 designee, for approval”), 25:11(“the CIO or his designee was not necessarily the individual
9 performing the verifications”).

10 Finally, the evidence established that the CIO, or his designee, simply confirmed before
11 signing the Form-DMC that these technical experts had done their job: that is, determined that
12 the requested workstations comply with State and DGS IT standards and security requirements.
13 3\21\2017 Tr. 87:22-88:9 (Funk: “I didn't specifically do that kind of analysis. *I look for the*
14 *signatures, because those are the individuals who did that type of analysis*”) (emphasis added);
15 3\21\2017 Tr. 18:9-13 (Aradi: “Mr. Alai said [...] he merely *wanted to be sure that people*
16 *preceding his signature signed*, and that told him -- *affirmed in his mind that everything was*
17 *kosher, he said, and followed the proper process.*”(emphasis added) Finally, Baaten testified
18 that: “So when it comes to me, *I would be evaluating to make sure any Subject Matter Experts*
19 *that need to review it and analyze it had actually had an opportunity to do so and signed off that*
20 *they completed their evaluation, ...*” (emphasis added).²⁸

21 Moreover, the evidence established that once it was determined that the requested
22 workstations complied with State and DGS IT standards and security requirements, Alai, as the
23 CIO’s designee, had no discretion to change the request.²⁹ Funk testified that if the Form-DMC
24 had been signed by the CTR, Alai was to sign it and move it on.³⁰ Likewise, if the Form-DMC

25 _____
26 ²⁸ 3\20\2017 Tr. 92:22-93:3.

27 ²⁹ 3/21/2017 Tr. 87:9-88:17, *see also* CCA at 25:21-21 (“Alai did not have authority to alter the products in the
28 requests”).

³⁰ 3/21/2017 Tr. 87:9-16 (Funk: “Q: Now, did you give Mr. Alai any instructions as to what to do if you were not
available to sign one of these DMCs? A: If one of these came through, the instruction was to look through it, make

1 was not signed by the Chief of Technology Resources, Alai had no discretion to sign it.³¹

2 The Enforcement Division attacks ALJ King's application of the ministerial exception in
3 this case by setting up a "straw man" mischaracterization of ALJ King's reasoning. ALJ King's
4 application of the ministerial exception in this case was not solely based upon a conclusion that
5 "Alai's approvals of Form-DMCs were ministerial actions because he was acting in obedience to
6 instructions from Jeffrey Funk, his boss." Nor did she conclude that "even though the duty is to
7 ensure the policies and standards are met, the activity was performed at a substandard level
8 without due diligence, so [...] this eliminated it as a governmental decision altogether since it
9 was performed in a haphazard way." Nor is there any evidence that, as suggested by the
10 Enforcement Division, Funk instructed Alai to "to skim over the required duties of the position"
11 or to perform those duties "at a substandard level without due diligence."

12 ALJ King's reasoning for applying the ministerial exception in this case was that: (1) "the
13 Form-DMC is an internal DGS form intended to ensure that the requested IT products are
14 consistent with statewide IT policies and standards as well as with DGS's IT policies and
15 standards,"³² (2) "the CTR analyzed the HP products requested for purchase to ensure they were
16 consistent with DGS's policies and SAM's security requirements (Finding 12)" and (3) [Alai's]
17 "sole task was to confirm the CTR had signed the form before signing the form himself (Finding
18 16)."³³

19 As discussed above, ALJ King's finding and conclusions in this regard were supported by
20 the testimony of Schnabel and Baaten, both called as witnesses by the Enforcement Division, and
21 by Funk, a witness called by Alai. Their testimony established that (1) the State and DGS IT
22 standards and SAM security requirements provided the "clear objective criteria" necessary to be
23 applied to determine if the Form-DMC should be signed; (2) the "subject matter experts"

24
25 sure that the signatures of the branch chief and technology chief or the technician group had signed it, and if those
signatures are in place, then we signed it and moved along.").

26 ³¹ 3/21/2017 Tr. 88:10-14 (Funk: "Q: And did Mr. Alai have any discretion to sign it if the chief of the -- Chief of
Technology Resources did not sign it? A: If the signatures weren't there, basically we sent it back.").

27 ³² Factual Finding 11, pg. 4.

28 ³³ Legal Conclusion 9, pg. 9.

1 ('SMEs") who reported to the CTR determined whether or not the HP products being purchased
2 complied with State and DGS IT standards and SAM security requirements; and (3) Funk,
3 Baaten and Alai's role in signing the Form-DMC *as managers* was to confirm the "subject
4 matter experts" had done so, which they did by being sure the CTR had signed the Form-DMC
5 attesting to the that fact.

6 **c. ALJ King's conclusion regarding "intermediate decisions" is**
7 **supported by the evidence.**

8 In the original and the amended formal Accusation, the Enforcement Division clearly and
9 unequivocally states that Alai violated the Act's conflict of interest prohibitions because: "By
10 signing the Form-DMC, Alai *obligated or committed his agency to complete the purchase order*
11 *to which the Form-DMC was attached.*"³⁴

12 Alai prepared and presented his defense against Counts 1 & 2 relying on the Enforcement
13 Division's express statement of what he was being accused, i.e. that he "*obligated or committed*
14 *his agency to complete the purchase order to which the Form-DMC was attached.*" Alai
15 established at the hearing that DGS never purchased any of the HP Z800 workstations listed on
16 the two Form-DMC's signed by Alai, as the HP Z800 had been discontinued by HP. Rather, in
17 early 2013, DGS obtained new quotes for the HP Z820 workstations. Alai never reviewed or
18 signed any Form-DMC's for the ten HP Z820 workstations that DGS did purchase, rather than
19 the Z800s for which Alai had signed.³⁵

20 In light of the irrefutable evidence at the hearing, the Enforcement Division attempted a
21 "bait & switch," which if accepted would deny Alai due process. In its Post-Hearing Brief, the
22 Enforcement Division abandoned the specific allegations set forth in the formal accusation, i.e.,
23 that he "*obligated or committed his agency to complete the purchase order to which the Form-*
24 *DMC was attached.*" Instead, the Enforcement Division argued that: "In this case, the evidence
25 proves that Alai made governmental decisions by obligating or committing DGS to a course of
26 action — *moving the acquisition package forward to the final procurement stage* — when he

27 ³⁴ Accusation at 6:18-19 & 7:7-8 & Amended Accusation at 6:18-19 & 7:7-8 (emphasis added).

28 ³⁵ Factual Finding 20, pg. 6.

1 signed and approved the Justification Form-DMCs.”³⁶ The Enforcement Division argued that
2 Alai signing the Form-DMCs constituted an “intermediate decision” that in itself violates the
3 Act. The Enforcement Division made this argument despite the fact that the two Form-DMCs
4 that Alai signed that are the basis for Counts 1 & 2 never did make it to the final procurement
5 stage, but instead were superseded by two new purchase orders for Z820 work stations for which
6 there was no evidence that Alai signed a Form-DMC.³⁷

7 Now the Enforcement Division criticizes ALJ King for rejecting its argument that the
8 mere fact that Alai signed two Form-DMCs that never did make it to the final procurement stage
9 constitutes an “intermediate decision” that in itself is a violation of the Act. However, as the
10 court explained in *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n* (2015) 237 Cal. App. 4th 812,
11 859–60: “The centrality of notice is indisputable. ‘Engrained in our concept of due process is the
12 requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend
13 charges. Notice is required before property interests are disturbed, before assessments are made,
14 before penalties are assessed,’” *Pac. Gas & Elec. Co., supra*, quoting, *Lambert v. California*
15 (1957) 355 U.S. 225, 228. Likewise, the United States Supreme Court has explained that an
16 essential function of notice is “to give the charged party a chance to marshal the facts in his
17 defense and *to clarify what the charges are, in fact.*” *Wolff v. McDonnell*, 418 U.S. 539, 564, 94
18 S. Ct. 2963, 2978, 41 L. Ed. 2d 935 (1974)(emphasis added). Finally, as the court explained in
19 *McFaddin San Diego 1130 Inc. v. Stroh* (1989) 208 Cal. App. 3d 1384:

20 While administrative pleading is not bound by the strict rules
21 applicable to pleading in court proceedings, a respondent must be
22 informed of the substance of the charges and afforded appropriate
23 elements of procedural due process. *Where a respondent is misled
24 to his prejudice in maintaining his defense a variance between
25 the pleadings and proof may be deemed material.* Here, we
conclude the accusation led Confetti to believe its liability was
premiered on it having “permitted” the drug transactions. A review
of the hearing transcript demonstrates Confetti conducted its
defense accordingly.

26 *Id* at 387.

27 ³⁶ Post-Hearing Brief at 19:1-3 (emphasis added).

28 ³⁷ Factual Finding 20, pg. 6., *see also* 3/20/2017 Tr. 62:20-66:21, 68:20-69:18, 72:12-75:5, 75:23-78:11 (Schnabel).

1 Likewise in this case, Alai was accused in Counts 1 & 2 of obligating or committing his
2 agency “*to complete the purchase order to which the Form-DMC was attached.*” He prepared
3 and presented his defense to Counts 1 & 2 accordingly, establishing that that DGS never
4 completed the purchase order for the HP Z800 workstations listed on the two Form-DMC's he
5 signed and he never reviewed or signed any Form-DMC's for the ten HP Z820 workstations that
6 DGS did purchase.³⁸ Basing a finding that Alai violated the Act on the FPPC’s attempted “bait
7 & switch” would deny Alai due process.

8 **d. ALJ King gave proper weight to the end result of the purchase orders.**

9 The Enforcement Division argues that ALJ King gave improper weight to the end result
10 of the purchase orders because the “Act does not require that Alai’s governmental decisions had
11 actual material financial effects.” However, as discussed above, this Commission’s current
12 regulations which were in effect at the time that the Enforcement Division filed its original
13 accusation against Alai, make clear that the Act's conflict of interest prohibitions apply “*only to*
14 *governmental decisions that have a financial effect.*”³⁹ The evidence presented at the hearing
15 established that the purchase orders that accompanied the Form-DMCs signed by Alai that are
16 the basis for Counts 1 & 2 were never completed and the HP products that were listed in both the
17 purchase orders attached to the Form-DMCs signed by Alai were never purchased.⁴⁰
18 Accordingly, Alai signing the Form-DMCs that are the basis for counts 1 & 2 *had no financial*
19 *effect* on either Alai or HP and, therefore, the Act’s conflict of interest prohibitions do not apply.

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

22 The Enforcement Division has conceded that no such evidence is known to exist.

23 **4. None of the dispositions provided for in Government Code section 11517**
24 **would be appropriate in this case.**

25 In light of ALJ King’s conclusion that the Enforcement Division failed to
26 establish by a preponderance of evidence that Alai violated the Act, no cause exists to impose an

27 ³⁸ Factual Finding 20, pg. 6.

28 ³⁹ Cal. Code Regs. tit. 2, § 18700(b) (emphasis added).

⁴⁰ See 3\20\2017 Tr. 62:20-66:21, 68:20-69:18, 72:12-75:5, 75:23-78:11 (Schnabel).

1 administrative penalty in this matter and the First Amended Accusation should be dismissed.

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

3 In this section of its brief, the Enforcement Division attempts to paint a picture of
4 Alai as someone who claims to promote “transparency and accountability” but “did not apply
5 transparency and accountability to his own governmental decisions.” However, in the
6 Enforcement Division’s admissions in the formal Accusation and in the Stipulated Facts, the
7 Enforcement Division acknowledged that: “Mr. *Alai did not conceal his financial interest,*
8 *disclosing his HP investment interest in his applicable statements of economic interests.*”⁴¹
9 Likewise, in both the formal Accusation and the Stipulated Facts, the FPPC admits that Alai
10 “*cooperated fully with Commission staff in investigating and resolving this matter.*”⁴²

11 **CONCLUSION**

12 For the reasons set forth above, Respondent George Alai respectfully requests that the
13 Commission accept as its own ALJ King’s proposed decision.

14
15 Dated: September 22, 2017

Respectfully submitted,

16
17 LAW OFFICES OF LAWRENCE J. KING

18
19 By: /s/ [Signature]
20 Lawrence J. King
Attorney For Respondent George Alai

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27 ⁴¹ Accusation at 9:8-10, Stipulated Fact No. 15.

28 ⁴² Stipulated Fact No. 16, *see also* Accusation at 9:8-10.

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PROOF OF SERVICE

I, Lawrence J. King, hereby declare that:

I am over eighteen years of age and a resident of Petaluma, California and the Plaintiff attorney in this case.

On September 22, 2017, I served a true copy of the following named, attached document:

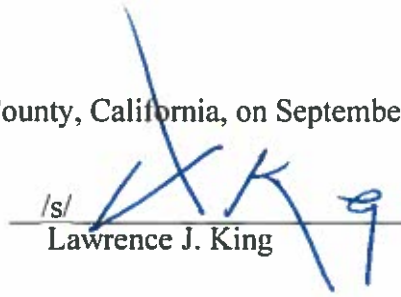
**RESPONDENT GEORGE ALAI'S BRIEF
IN SUPPORT OF ALJ KING'S PROPOSED DECISION**

by emailing a copy to the following address:

**Angela J. Brereton
Senior Commission Counsel
Enforcement Division
California Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814-2329
ABrereton@ed.ca.gov**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTed at Petaluma, Sonoma County, California, on September 22, 2017.

ls/


Lawrence J. King