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

11 In the Matter of

13 GEORGE ALAI,

15 Respondent.

) OAH No. 2016090791
) FPPC No. 13/1135

)
) **REPLY BRIEF OF THE ENFORCEMENT**
) **DIVISION OF THE FAIR POLITICAL**
) **PRACTICES COMMISSION RE: PROPOSED**
) **DECISION OF ADMINISTRATIVE LAW**
) **JUDGE TIFFANY L. KING**

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

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19 This matter came before Administrative Law Judge Tiffany King of the Office of Administrative
20 Hearings (OAH), on March 20 – 21, 2017, in Sacramento, California, who issued a Proposed Decision on
21 July 19, 2017. Complainant, the Enforcement Division of the Fair Political Practices Commission
22 (Commission), having submitted an Opening Brief and received Respondent George Alai's Brief
23 regarding the Proposed Decision, submits the following Reply Brief.

24 **I. INTRODUCTION**

25 George Alai argues generally that ALJ King's Proposed Decision is supported by the evidence and
26 that ALJ King properly applied the law. But, as discussed in the Enforcement Division's Opening Brief
27 and in this Reply Brief, Alai's arguments fall short.

1 **II. DISCUSSION**

2 **A. ALJ King's Conclusion in Factual Finding No. 14 is Not Supported by Ms. Schnabel's**
3 **Testimony, the Only Evidence Cited**

4 Alai argues that Factual Finding No. 14 is supported by the evidence because Ms. Schnabel's "full"
5 testimony regarding Justification Form-DMCs and mandatory contracts was consistent with the testimony
6 of Mr. Funk and Ms. Baaten because they each confirmed that the CTR had signed off on the Justification
7 Form-DMC before signing themselves.¹ While this may accurately depict the full extent of Mr. Funk's
8 review of Justification Form-DMCs, Alai fails to include that Ms. Baaten testified that the CTR's signature
9 was only one part of the analysis and review in which she engaged when presented with a Justification
10 Form-DMC for her approval. Ms. Baaten, who is currently a DPM IV with DGS and has signed off on
11 many Justification Form-DMCs since she was hired in 2012, testified that she reviewed all of the
12 information in the acquisition packages attached to the Justification Form-DMCs – including IT staff notes
13 and the requesting program's business justification – even when a mandatory contract was involved, to
14 make sure IT had done its due diligence and that the products met the business need before she signed
15 off.² And even if Alai's account of Ms. Baaten's testimony were complete, ALJ King's Proposed Decision
16 does not take the testimony of Mr. Funk or of Ms. Baaten into consideration regarding the relationship
17 between Justification Form-DMCs and mandatory contracts – the Proposed Decision only cites Ms.
18 Schnabel's testimony.

19 And, as stated in the Enforcement Division's Opening Brief, Ms. Schnabel, who has years of
20 experience regarding DGS IT acquisitions policy and procedure, did not testify regarding discretion and
21 mandatory contracts during the hearing, but only confirmed that a mandatory contract would list approved
22 products and would list the mandatory vendor.³ She did not testify at any point during the hearing that
23 these traits of a mandatory contract turned the signing and approving of Justification Form-DMCs into
24 non-discretionary acts. So the evidence relied upon in Factual Finding No. 14 of ALJ King's Proposed
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27 ¹ Alai's Brief re: Proposed Decision, 7:10-11.

28 ² Hr'g Tr., Mar. 20, 2017, 92:22-93:3, 93:11-16, 93:22-24, 109:17-18, 109:25.

³ Hr'g Tr., Mar. 20, 2017, 72:6-11.

1 Decision does not support ALJ King's conclusion that the CTO does not exercise any discretion when
2 signing Justification Form-DMCs.

3 **B. ALJ King Failed to Acknowledge Relevant Contradictory Evidence Regarding the**
4 **Governmental Decisions at Issue.**

5 ALJ King's conclusion that Alai's conduct was ministerial is unsupported by the evidence
6 admitted at the hearing. Much of the admitted documentary evidence and witness testimony – including
7 the Form-DMCs, DGS policies and procedures regarding Form-DMCs and the testimony of Kathy
8 Schnabel and Ann Baaten – leads to the conclusion that signing and approving of Form-DMCs required
9 discretion and was not ministerial. Alai essentially argues that because the Enforcement Division's
10 Opening Brief did not include specific citations to relevant contradictory evidence, no such evidence was
11 admitted in this matter. But such evidence was admitted, and Complainant's Closing Argument, Section
12 V, A, 2, which is included as Exhibit 65 in the record of this matter, cites all of the relevant evidence and
13 presents a complete analysis of the evidence in light of the applicable law and the Commission's long-
14 standing interpretations of the conflicts of interests provisions regarding the making of governmental
15 decisions.⁴ The Enforcement Division previously provided all of the specific citations in the record, so a
16 general description of the contradictory evidence was appropriate to note that ALJ King's Proposed
17 Decision failed to acknowledge contradictory evidence.

18 **C. The Law at the Time of the Relevant Violations Applies to Alai's Conduct**

19 As shown in the Enforcement Division's Opening Brief, ALJ King improperly applied the current
20 conflict of interest regulations, and should have applied the regulations in effect at the time of Alai's
21 conduct.⁵ In the Proposed Decision, ALJ King states that the April 27, 2015 changes to the Commission's
22 conflict of interest regulations were "non-substantive" and "without regulatory effect," and "the current"
23 regulations should apply to this case.⁶ But as discussed in the Enforcement Division's Opening Brief, the
24 Commission's revision project regarding the conflict of interest regulations made changes to the conflict
25 of interest analysis which were quite substantive and dramatically different than previous interpretations
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27 ⁴ Exhibit 66 – Complainant's Closing Argument, 13:18-27:13.

28 ⁵ Enforcement Division's Opening Brief re: Proposed Decision, 5:9-6:4.

⁶ Proposed Decision, p. 7, ¶3.

1 of Sections 87100 and 87103. And between the time of Alai's conduct and the April 27, 2015 regulations
2 cited by ALJ King, the Commission's conflict of interest regulations changed 14 times. Further, the
3 Commission did not approve the final version of the regulations until July 2015. Under these
4 circumstances, it would be unfair to any public official, including Alai, for the Commission to apply the
5 current law to his past conduct.

6 **D. ALJ King Improperly Applied the Ministerial Exception to the Facts of This Case**

7 ALJ King's analysis does not reflect the Commission's long-standing narrow application of the
8 ministerial exception, and Alai's arguments to the contrary do not change that. As shown in the
9 Enforcement Division's Opening Brief, the advice letters and case law cited both in the Proposed Decision
10 and in Alai's Brief show that statutory and regulatory action is required to set the "clear objective criteria,"
11 not merely a supervisor's instructions, for the Act's ministerial exception to apply.⁷ Alai cites two new
12 cases – *Wilson v. Cty. of Napa* (2017) 9 Cal.App.5th 178, 189, and *Sierra Club v. Cty. of Sonoma* (2017)
13 11 Cal.App.5th 11, 22 – but again, these cases address statutory requirements. In *Wilson*, the California
14 Elections Code required an initiative petition to contain the full text of the measure that the initiative
15 proposed to enact, and the county registrar had a ministerial duty to reject any petition that did not follow
16 this statutory requirement.⁸ And in *Sierra Club*, the California Environmental Quality Act (CEQA)
17 allowed an exception to the requirement for environmental review for an agency's ministerial acts, which
18 were described in the CEQA guidelines as "situations where the public agency or body merely has to
19 determine whether there has been conformity with applicable statutes, ordinances, or regulations."⁹ In this
20 case, Alai only followed Mr. Funk's instructions to look for the CTR's signature when he signed the Form-
21 DMCs.

22 Alai argues that the Enforcement Division set up a "... 'straw man' mischaracterization of ALJ
23 King's reasoning" regarding her application of the ministerial exception to Alai's conduct.¹⁰ But ALJ
24 King's Legal Conclusion No. 8 states:

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27 ⁷ Enforcement Division's Opening Brief re: Proposed Decision, 6:13-7:11.

⁸ *Wilson v. Cty. of Napa* (2017) 9 Cal.App.5th 178, 189.

⁹ *Sierra Club v. Cty. of Sonoma* (2017) 11 Cal.App.5th 11, 22.

¹⁰ Respondent's Brief re: Proposed Decision, 13:2-6.

1 At the direction of his supervisor ... respondent signed two Form-DMCs ... In doing so,
2 respondent exercised no discretion or judgement. Following Funk's instructions, he
3 performed a cursory review of the forms to ensure they had been signed by the CTR.
4 Having confirmed this requirement was met, respondent signed each form. ... Accordingly,
5 respondent's acts of signing the Form-DMC's were purely ministerial, and did not
6 constitute "making a governmental decision."¹¹

7 This language clearly shows that ALJ King concluded that Alai's approvals of the Form-DMCs were
8 ministerial actions because he was acting in obedience to instructions from Jeffrey Funk, his boss. And
9 there is no evidence to indicate that Alai did anything but follow his supervisor's instructions.

10 Alai also argues that the State and DGS IT standards and security requirements provided the
11 objective set of criteria to meet the ministerial requirement.¹² But other evidence shows that these were
12 not the only considerations the CIO or his designee was required to evaluate as would be required to meet
13 the exception. Ann Baaten testified that she also reviewed the business justification – the reasons the
14 requesting program wanted the products – to make sure the products requested met the need described.¹³
15 So even if the products otherwise complied with the State and DGS requirements, the CIO or his designee
16 could reject the Justification Form-DMC if the product did not meet the need described. Such an
17 evaluation does not fit within the ministerial exception. Alai's conclusion that "once it was determined
18 that the requested workstations complied with State and DGS IT standards...Alai...had no discretion to
19 change the request"¹⁴ is not supported by the evidence.

20 Alai further argues that because the CTR analyzed the products for compliance with "DGS policies
21 and SAM's security requirements," and Alai checked that the CTR had signed off, Alai met his ministerial
22 duty for the Justification Form-DMC. But the declarations in the Justification Form-DMCs show that the
23 obligations of the CTR were different from those of the CIO or his designee. As quoted in the Proposed
24 Decision, the CTR confirmed that the products complied with the "[DGS] Desktop and Mobile Computing
25 Policy" and "with all applicable security requirements included in the SAM."¹⁵ But in addition to
26 confirming compliance the Desktop and Mobile Computing Policy, the CIO or his designee also certified
27 compliance with specific sections of the SAM, and that the products were "consistent with [DGS's] current
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¹¹ Proposed Decision, p. 9, ¶8.

¹² Respondent's Brief re: Proposed Decision, 11:14-16.

¹³ Hr'g Tr., Mar. 20, 2017, 93:1,14-15.

¹⁴ Respondent's Brief re: Proposed Decision, 12:21-23.

¹⁵ Proposed Decision, p. 4, ¶12.

1 information management strategy and information technology infrastructure.”¹⁶ So merely checking that
2 the CTR signed off on the form would not fulfill all of Alai’s obligations related to the Justification Form-
3 DMCs.

4 Mr. Funk’s instructions were not statutory or regulatory authority and were insufficient to support
5 application of the Act’s exception for ministerial acts. ALJ King’s application of the ministerial exception
6 to Alai’s actions is contradictory to the Commission’s long-standing narrow application of the ministerial
7 exception.

8 **E. ALJ King’s Conclusion Regarding “Intermediate Decisions” is Not Supported by the Evidence.**

9 ALJ King concludes that a signed Form-DMC is not a “necessary prerequisite” to complete the IT
10 procurement process.¹⁷ But as previously shown in the Enforcement Division’s Opening Brief, the
11 evidence upon which ALJ King relies is insufficient to support her conclusion.¹⁸

12 Alai argues that the Enforcement Division’s closing arguments were a “bait & switch.”¹⁹ But Alai
13 is incorrect. The allegations and the applicable law did not change when Complainant’s Closing
14 Arguments brief was filed, and Alai received the proper notice of both the allegations and the applicable
15 law when he was served with the Accusation in April 2016. No changes were made to the allegations or
16 the law in the First Amended Accusation, except for the 3 typographical errors to the model numbers,
17 which did not prejudice Alai.²⁰ The arguments made by the Enforcement Division were permissible and
18 consistent with the admitted evidence and the applicable law. The evidence here showed that the operative
19 effect of Alai’s signature was to send the acquisition package to the Procurement Division, which would
20 normally lead to the purchase of the products, hence, completing the purchase order. The Accusation and
21 the First Amended Accusation clearly identified the law in Regulation 18702.1, subdivision (a) as it
22 existed in 2012 and 2013: “[a] public official made a governmental decision when the official, acting
23 within the authority of his office or position, obligated or committed his agency to any course of action.”²¹
24 The argument that his intermediate governmental decision is wiped out of existence because the purchase

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26 ¹⁶ *Ibid.*

¹⁷ Proposed Decision, p. 9, ¶9.

¹⁸ Enforcement Division’s Opening Brief re: Proposed Decision, 8:14-9:3.

¹⁹ Respondent’s Brief re: Proposed Decision, 14:20-21.

²⁰ Proposed Decision, p. 2.

²¹ Accusation, 3:2-4; First Amended Accusation, 3:2-4.

1 was not ultimately made is a misapplication of the Act. Alai had more than adequate notice of the charges,
2 and he was present at the hearing. The Enforcement Division's arguments were based upon the evidence
3 and the law, and do not deprive Alai of his due process.

4 Alai also argues that the Commission's conflict of interest regulations do not apply to Alai's
5 conduct because his decisions had no financial effect on HP. But Alai misinterprets the Act and takes
6 these words out of context. First, the Act explicitly requires a financial effect so people don't think the
7 Act covers personal conflicts – the Act's conflict of interest provisions focus only on the public official's
8 economic interests. Second, the financial effect on the public official's economic interest must be
9 evaluated in two distinct steps: whether the financial effect was material, and whether the material
10 financial effect was reasonably foreseeable. Neither Alai, nor ALJ King, evaluates the financial effect on
11 HP within the context of either of these steps, as shown by their reliance on the ultimate outcome of the
12 purchase order rather than the contemporaneous evaluation of the financial effect at the time the decision
13 was made. The evidence in this case shows that at the time the governmental decisions were made, the
14 decisions had a reasonably foreseeable material financial effect on HP.²² Alai's argument fails.

15 **F. ALJ King improperly gives weight to the end result of the purchase orders.**

16 ALJ King concludes, and Alai agrees, that Alai's signatures on the Form-DMCs did not obligate
17 or commit DGS to any course of action because the products identified were not the products actually
18 purchased.²³ But this issue is a red herring. The Act does not require that Alai's governmental decisions
19 had actual material financial effects. The law only requires reasonably foreseeable material financial
20 effects at the time the decisions were made. Conflict of interest laws are concerned with what might have
21 happened, not what actually happened, because a recusal must happen in real time.²⁴ Whether the products
22 were actually purchased is irrelevant.

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26 ²² Exhibit 66 – Complainant's Closing Argument, 31:3-35:10.

²³ Proposed Decision, p. 9, ¶10.

27 ²⁴ See *People v. Honig* (1996) 48 Cal. App. 4th 289, 314, italics in original, citing *Thomson v. Call* (1985) 38 Cal.
28 3d 633, 648; *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal. App. 592, 601; *Stigall v. City of Taft* (1962) 58 Cal. 2d 565, 569-
570, quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520, 549-550; *People v. Vallerga* (1977) 67
Cal. App. 3d 847, 865; *People v. Watson* (1971) 15 Cal. App. 3d 28, 39.

1 **G. Recommended Government Code section 11517 Disposition**

2 As stated in the Enforcement Division's Opening Brief, the Enforcement Division recommends
3 that the Commission reject the Proposed Decision, and decide the case upon the record, including the
4 transcript, either with or without taking additional evidence.

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

8 **III. CONCLUSION**

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

13 Dated: October 6, 2017

FAIR POLITICAL PRACTICES COMMISSION

14 By: Galena West
15 Chief of Enforcement

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Angela J. Brereton
18 Senior Commission Counsel