OFFICE OF ADMINISTRATIVE LAW JUDGES
U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C. 20001

In the Matter of

U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, Respondent.	)	Case No. 2002-CCP-1

In the Matter of

U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA APPRENTICESHIP COUNCIL, Respondent.	)	Case No. 2003-CCP-1

RESPONDING PARTY CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS' RESPONSE TO PROSECUTING PARTY UNITED STATES DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES' MOTION TO COMPEL

OATELS brought this motion to 1) compel further answers to Interrogatories 4 and 18, and 2) require further labeling and identification of documents, and 3) compel the production of material withheld because of privilege. OATELS Motion to Compel is without merit and is based on a fundamental misunderstanding of both CDIR's obligations and what discovery CDIR had already provided and had already offered to make available for review and inspection.

The misconceptions leading to this waste of time follow from OATELS failure to follow the usual practice of a final "meet and confer" about these requests before filing a Motion, as shown by what happened when CDIR contacted OATELS for an extension. On June 19, 2003, CDIR contacted OATELS about its motion. See Dec. Lonsdale. CDIR (asking for additional time to respond) pointed out that OATELS may have misunderstood what had been produced, or may have had a miscommunication with its San Francisco counsel about the review of "program files" which CDIR offered under Rule 33(d) in response to Interrogatories 4 and 18. See letter of June 25 attached to Dec. Lonsdale as Exh. 4. This phone conference on June 19, 2003, functioned like a "meet and confer" under FRCP § 37(a)(2), however it was initiated by CDIR and after the OATELS motion had already been filed. While OATELS did agree to have its San Francisco counsel review the material responsive to Interrogatories 4 and 18, OATELS refused to withdraw its motion even after OATELS had been advised about its erroneous assumptions about what documents CDIR had produced. See OATELS letter of July 2, 2003, Dec. Lonsdale, Exh. 5.

First, OATELS complains that CDIR's production of six boxes of documents does not respond to its Interrogatories 4 and 18, and is not properly identified. CDIR however

did not produce the six boxes in response to Interrogatories 4 and 18. CDIR's response to Interrogatories 4 and 18 clearly states that the information requested is contained in "program files" which will be made available and as of this writing, OATELS is presently engaged in this review. See Dec. Lonsdale. (two visits in June and July 2003, program files were also shown in April).

Second, the documents produced were not an unidentified mass of paper. CDIR conferred with OATELS regarding the six boxes when they were produced, informing OATELS what types of documents the boxes contained, and, as to their manner of production, with the understanding that the documents would be produced as kept in the normal course of business. Thereafter, at OATELS' direction, the documents were copied and marked by BATES-stamped number by OATELS' copy service agent.

Third, OATELS asserts that privileges raised by CDIR to its responses have purportedly been waived by CDIR's alleged failure to specify its objections. CDIR clearly listed all privileges asserted. CDIR also raised objections based on overbreadth, vagueness, and ambiguity, and has been providing information about any withheld documents while attempting to get clarification from OATELS about the scope of its requests, and while sorting through scores of other documents that it is in the midst of producing. CDIR cannot further refine its responses until OATELS narrows and clarifies its requests.

CDIR is mystified as to why OATELS has brought this motion at this time. OATELS has been fully informed of CDIR's activities to comply with its discovery requests. CDIR offered OATELS the opportunity to withdraw this motion or suspend it

while the production process is still underway. That OATELS has chosen to pursue this motion at this time is truly mystifying and indeed frivolous.

MOTION TO COMPEL LABELING OF INITIAL DISCLOSURE DOCUMENTS ACCORDING TO WHICH PART OF INTERROGATORY 4 OR 18 THEY REFER TO SHOULD BE DENIED BECAUSE THIS DISCLOSURE DID NOT RESPOND TO THOSE INTERROGATORIES AND OATELS HAS YET TO REVIEW AND COPY ANY DOCUMENTS PRODUCED IN LIEU OF RESPONSES TO THESE INTERROGATORIES, ALTHOUGH IT HAS TWICE INSPECTED THEM.

CDIR responded to OATELS discovery request on March 18, 2003. Thereafter, on March 27, 2003, counsel conferred about this discovery and it was agreed that OATELS would serve a request for more sufficient responses with a clarification of certain of the request and interrogatories. On April 17, 2003, CDIR responded to those follow-up requests. In these preliminary discussions, CDIR had noted that it did consider some of the requests vague or burdensome and unlikely to lead to relevant evidence and had pointed out, for example, that the original request for documents from 1989 forward encompassed dozens of boxes of ERISA preemption litigation that bore little if any relevance to any aspect of this derecognition proceeding. The issue of whether it would be burdensome to produce those dozens of boxes of documents was mooted when OATELS limited its request to documents after January 1, 1995. While the parties discussed the proper scope of the OATELS request, CDIR had assembled some documents, specifically including the California Apprenticeship Council ("CAC") Minutes and related documents of the CAC, that CDIR indicated to OATELS would be produced in any case. It was agreed that an OATELS representative would contact CDIR to arrange inspection of the documents already assembled, such as the CAC minutes.

CDIR was also reviewing hundreds of other boxes of potentially responsive documents from headquarters files of prior administrations as well as field offices. In addition, a set of audio tapes of the CAC meetings was assembled. While OATELS asserts that these tapes were "due" on March 18, what was due was CDIR's response, which indicated that the tapes would be produced. It is OATELS obligation to inspect and copy these tapes, not CDIRs. See FRCP § 34(b).

OATELS appears to confuse CDIRs obligation to respond to OATELS' Request for Production with the actual production of documents. CDIR has been working to provide discovery in this matter and has devoted significant staff time to this project. CDIR hired a retired annuitant to assist with the file review, incurring this added expense despite record budget problems. Several hundreds of pages of documents were provided on March 18, 2003 with the initial response to the Interrogatories and Request to Produce, including all available documents that were responsive to some of the requests.

On April 28, 2003, CDIR counsel and OATELS San Francisco counsel met and reviewed the documents that had already been assembled for inspection. These included the minutes of the CAC and CAC Commissioners folders, and, in response to Interrogatory 20, the administrative records in three cases that the CAC considered that involved issues of program expansion. In total these documents filled six boxes.

OATELS begins its motion with a correct description of the initial steps taken in the discovery process, page 2, but then makes a very misleading statement about the initial document production. OATELS suggests that CDIR "in lieu of production and responses to certain interrogatories" permitted OATELS to copy almost 15,000 pages of documents "which were Bates-stamped for easy reference." Page 2. This erroneously

suggests that CDIR had unilaterally selected and Bates-stamped these documents, and then given a mass of undifferentiated paper to OATELS to copy. In fact, CDIR produced these documents for inspection on April 28, 2003 in their original form in proper response to OATELS Request to Produce. It was OATELS that arranged for a copy service to take the original documents and then copy and Bates-stamp these documents. At the time of the inspection it was agreed with the OATELS attorney that the documents would be Bates-stamped, and the documents were grouped by box by subject matter. No other organization was requested at the time the documents were produced. See Dec. Lonsdale, Dec Belcher. OATELS then arranged for a copy service to pick up the six boxes and copy and Bates-stamp those documents. CDIR advised the copy service about the order in which the boxes should be copied to make the most sense, and to keep the documents in the same box as they had been produced. Dec. Belcher. The documents were thus produced as they are kept in the usual course of business, as is allowed under FRCP § 34(b).

> **(b) Procedure**. . . .
>
> A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

See DCA Incorporated v. Resorts International, 1989 WL 138846 (1989) (documents need not be in the order plaintiff wished if they are organized as they are kept in the usual course of business.)

The documents produced by CDIR were not simply a large stack of papers thrown in a one large pile. OATELS suggests that there was no organization of these documents

related to the discovery requests. Page 3, line 3. This is simply not true. Indeed, these documents, while voluminous, were limited to distinct kinds of documents and organized by those kinds. One kind were the minutes of the CAC and related documents. See, Dec. Lonsdale, Exh. 2. These were two full boxes of documents, and part of a third. Each set of minutes begins with a cover that identifies the meeting date, and each contains an agenda. Each of the Commissioner's folders is for a separate meeting. There were three Administrative Records from three program complaints heard by the CAC. See Dec. Lonsdale, Exh. 3. These three Administrative records filled three boxes. One of the boxes, in addition to 1995 Commissioner folders, contained some bound CDIR reports and also contained some additional material that was identified to OATELS as responsive to its request for material on "need" and program expansion that had been served as a response a similar discovery request.

It is difficult to see how the production of these CAC minutes in their entirety and boxes of Administrative Records of CAC appeals would be an attempt to "mix critical documents with others" see Rule 34, 1980 Advisory Committee notes. Each of the Administrative Records contained all the material considered by the CAC in its decisions and to the extent any of it is relevant at all, all of the material is equally relevant. The CAC minutes are business records of the CAC. Indeed, OATELS was advised on several occasions that the minutes could be reviewed and background material removed before copying and OATELS chose to copy the entire set of minutes.

These documents were produced for inspection by OATELS as they were kept in the normal course of business. For example, the CAC minutes are bound by meeting and kept in booklet form. The Commissioners Folders were kept by meeting as well. The

Administrative Records were generally in binders, or transcripts of hearings. These documents were then placed in six boxes, not at random, but by type of document so that they could be more easily located and kept separate and CDIR identified what was in each box.

The three boxes containing administrative records of program appeals adequately responded to Interrogatory 20. In the CDIR response to Interrogatory 20, CDIR identified the programs and indicated that these records would be produced. It is truly amazing that OATELS would suggest that it did not know what these documents were, or that OATELS would suggest that these documents were produced in response to Interrogatories 4 and 18 rather than Interrogatory 20. In Appendix B to its own motion, OATELS includes CDIR's response to the OATELS request for clarification that provides even more specific reference to these cases. CDIR sent copies of the decisions in these administrative cases with that response and again indicated that the files would be provided. See pages 26-30 of Appendix B to OATELS Motion. They were in boxes four, five and six. It is hard to believe that OATELS could not determine, for example, that the administrative record in the PHCC case, box 4, was the same PHCC record referred to in the responses to interrogatory 20.

In a similar way the other three boxes were produced to hold specific documents responsive to OATELS request by classification of document. Box One contains the minutes of the CAC. Box Two contains a set of CAC Commissioner's Folders from 1996 to the present. Box Three includes CAC Commissioners folders from 1995, some DIR publications, as well as some discovery from a prior matter that responded to OATELS requests as well. These documents were never identified as responsive to

interrogatory 4 or 18. These documents were never identified as the only documents CDIR intended to produce. OATELS never contacted CDIR to arrange further inspection of other documents. It must be noted that OATELS initial request, included in Appendix E, does not set forth any time or place for production. As the above demonstrates, OATELS was provided with an identification of the 15,000 pages that were provided. Its request on this point is without merit. Under these circumstances CDIR's initial disclosure complies with FRCP § 34 and 29 CFR §§ 18.18 and 19.

Under Rule 34, as noted above, production of identified documents in the manner they are normally maintained is proper. Muhl v. Tiber Holding Co, 1997 1997 WL 13680 (Defense counsel stated that defendant produced "documents in the way in which they're maintained." [Tr. at 84.] With respect to the 15,000 pages of Ardra documents specifically, defense counsel stated that they were "copied in the way that they are normally maintained in the ordinary course of business". [Tr. at 17]. Since defendant copied and produced the documents in one of the ways permitted by Fed.R.Civ.P. § 34(b), it need not organize and label the documents to indicate which specifically correspond to request number 8). *And see*, Rowlin v. Alabama Dept. of Public Safety, 200 FRD 459 (2001) where the Court stated: "In addition, Rule 34(b) expressly grants the producing party the choice whether to produce documents 'as they are kept in the usual course of business or ... [to] organize and label them to correspond with the categories in the request.' Thus, under Rule 34, it is up to the producing party to decide how it will produce its records, provided that the records have not been maintained in bad faith." These later cases do not follow earlier decisions contra, e.g., Board of Ed. v. Admiral Heating & Vent, (ND IL 1984) 104 FRD 23.

CDIR HAS PROPERLY RESPONDED TO INTERROGATORIES 4 AND 18 BY PRODUCING SOME "LOGS" AND DOCUMENTS AND OFFERING TO ALLOW OATELS TO REVIEW IDENTIFIED FILES FOR ADDITIONAL INFORMATION.

OATELS also asserts that CDIR failed to properly respond to Interrogatories 4 and 18. In its motion, OATELS sets out the Interrogatory and then CDIR's response and then OATELS attempt to clarify and finally CDIR's reply. See Motion pages 7-8 as to Interrogatory 4. Having correctly quoted this response and reply, then, OATELS completely loses its way in conveying the sense of CDIR's response. A fair reading of the exchange unequivocally shows that CDIR already provided two "logs" to identify programs that had been approved, but maintained that additional information requested was not routinely maintained. CDIR offered to provide access to the "program files" from which the information could be taken. OATELS stated "while we are willing to review and copy the files in question" CDIR should provide guidance and identify certain documents. CDIR replied that it would provide "appropriate personnel to provide you with guidance during your review of the files in question." Page 8.

The "files in question" are in files in the DAS file room and were shown to an OATELS attorney on April 28, 2003, at the time of the initial document production. Dec. Lonsdale. OATELS never contacted CDIR to arrange such a file review prior to filing this motion. Instead, OATELS filed this motion asserting that CDIR had produced those 15,000 pages of documents in CDIR's initial disclosure in response to these two interrogatories. OATELS complains "Indeed CDIR has not even indicated where in the nearly 15,000 pages produced the requested program files are located...."

The "program files" are of course not located in those documents, and were never intended to be in those documents and moreover OATELS was never told the "program

files" had been produced. OATELS was advised in the telephone conference of June 19, 2003, after this motion had been filed that these "program files" had been shown to its local counsel but had never been reviewed by anyone from OATELS much less copied. In that phone conference, CDIR offered to make the "program files" available, and has now made them available to the same OATELS attorney who had been show the file room April 28, 2003, at the time of the initial document production. OATELS counsel has been reviewing these files and marking portions to be copied. He visited CDIR on June 27, 2003 and July 3, 2003. Dec Lonsdale. To the extent the CAC considered any programs, and that material is not in the "program file," CAC action is memorialized in its minutes, as was noted in the response of the CAC. OATELS can find this material as easily as CDIR as it only involves looking through the minutes for an agenda item on program approval.

As the above shows, OATELS argument on pages 9 and 10 is therefore off the mark. OATELS however would not withdraw this motion even after it was pointed out that the failure to show where "the program files" could be found in the 15,000 page disclosure was a case of OATELS jumping to an erroneous conclusion about the purpose of the 15,000 page disclosure. Since OATELS has now started, but has not finished reviewing the actual "program files" and related documents it is impossible know whether OATELS will find problems with the actual files. One thing is certain however, the OATELS motion is based on the incorrect and totally unwarranted assumption that the documents produced were "program files" is frivolous.

The mistake about Interrogatory 4 was made as to Interrogatory 18. In short, OATELS misunderstood the nature of the response to its document request, and made a

motion based on the assumption that the documents that had been produced responded to Interrogatories 4 and 18. OATELS made a mistake. The "program files" are being produced.

CDIR HAS NOT WAIVED PRIVILEGES AS TO SPECIFIC DOCUMENTS BECAUSE THE SCOPE OF OATELS REQUEST HAS NOT BEEN DETERMINED

OATELS has also asserted that CDIR has waived privileges. We presume this argument, while made in general terms, is directed to the responses to Interrogatories 4 and 18(based on the statement on page 2 that OATELS will request intervention only where it determines further informal requests futile). OATELS then goes on to request additional responses to Interrogatories 4 and 18. A fair reading of the CDIR response to Interrogatories and Request to Produce shows there is no merit to this claim of waiver or privileges or objections. As OATELS admits, CDIR indicated that it was not withholding specific documents, except as to attorney client communications. Motion page 5. OATELS had written asking CDIR to clarify "in all cases where that agency was withholding information." Page 4. CDIR pointed out to OATELS that it had asserted that the Discovery requests were overbroad and unclear and therefore it was impossible or unduly burdensome to assert the privilege as to specific documents until there was some agreement as to which documents were properly requested. In fact, certain privileges were asserted in an exercise of caution until OATELS clarified and refined its discovery requests. To find waiver under these circumstances would be absurd. If CDIR identifies specific documents it seeks to withhold it will clearly identify those if

requested. To date it has not withheld documents except as set forth above or in its response. These have been attorney client communications.

OATELS discussion of other objections at page 5-6 is very difficult to understand in the context of the parties actions. OATELS asserts that "specific" objections were not made, however a few pages earlier OATELS sets out the process by which CDIR had objected to OATELS discovery and OATELS had attempted to clarify its discovery. A review of Appendix B shows that where OATELS felt is necessary, CDIR was asked to and did explain the nature of its objections. See for example page 10 of Appendix B. OATLES had asked about "all persons" involved in the "development or enactment" of Labor Code § 3075(b). CDIR had objected that this was overbroad and vague and not likely to lead to relevant evidence, *inter alia*. CDIR then went on to provide the bill history and other legislative material. OATELS requested clarification about the "legislator's privilege" and identification of persons in the proposal and passage of the statute. CDIR responded about the legislator's privilege and asserted it had identified the legislators who had been involved in Section 3075(b) and the bills sponsors and supporters. OATELS has not asked for further clarification. This hardly seems an unsubstantiated objection by CDIR.

This example, as well as the entirety of Appendix B shows that OATELS, contrary to what it says on page 6 of its motion, not only could, but did attempt to clarify its vague and ambiguous requests. Again, this discussion suggesting that CDIR did not address or justify any of its objections at page 5 in OATELS motion seems unrelated to the parties actual conduct with respect to discovery in this matter. CDIR was faced with what it felt were mostly vague and ambiguous requests and interrogatories. A review of

the CDIR responses shows that CDIR did not simply assert objections. See also, CDIR letter of June 25, 2003, Dec. Lonsdale, Exh. 4. Rather, CDIR attempted to answer the questions, even those it found vague, and, in general, set out its objections in the event OATELS found the answer not responsive to what it intended to ask. CDIR believes its objections were made properly and that in the context of its responses and attempts to informally resolve and questions about discovery, OATELS has been clearly told the nature of the CDIR objections. It is almost as though this portion of the motion was drafted before the parties met and conferred about this discovery.

Respectfully submitted,

Dated: July 7, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2003, I served a copy of the foregoing Responding Party California Department of Industrial Relations' Response to Prosecuting Party United States Department of Labor, Office of Apprenticeship Training, Employer and Labor Services' Motion to Compel; Decl. of Fred D. Lonsdale in support of Respondent's Response to Prosecuting Party's Motion to Compel, with Exhibits 1-5; and Declaration of Carol Belcher in support of Respondent's Response to Prosecuting

Party's Motion to Compel by electronic transmission and postage prepaid, on the following:

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