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.	)	Case Nos. 2002-CCP-1, 2003-CCP-1
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,	)	
Respondent,	)	
and	)	
CALIFORNIA APPRENTICESHIP COUNCIL,	)	
Respondent.	)	

PROSECUTING PARTY'S OPPOSITION TO RESPONDENT CALIFORNIA APPRENTICESHIP COUNCIL'S MOTION TO COMPEL

INTRODUCTION

Pursuant to 29 C.F.R. § 18.6(b) (2003), Prosecuting Party Office of Apprenticeship Training, Employer and Labor Services ("OATELS") hereby opposes Respondent California Apprenticeship Council's ("CAC") Motion to Compel Further Responses to Interrogatories. CAC's motion was served on January 20, 2004, and thus OATELS' opposition is filed within the regulatory ten-day period for answers to motions. See § 18.6 (b).

On September 19, 2003, CAC served the interrogatories in question on OATELS. OATELS responded on October 27. On November 10, CAC informally requested fuller responses from OATELS, and OATELS responded by letter on January 7, 2004. On January 14,

counsel for CAC and OATELS conferred about the remaining disputed issues, but were unable to resolve all of them. CAC's motion followed on January 20.

CAC's motion seeks further responses to 17 interrogatories, which fall into three groups: (1) requests for information about (a) communications between the Secretary of Labor and OATELS and/or its lawyers on the Department of Labor's ("DOL") concurrent registration decision; and (b) post-derecognition-decision communications between the same parties on California apprenticeship (Interrogatories Nos. 2-13); (2) a request for identification of OATELS' reasons for derecognizing CAC and CDIR (Interrogatory No. 16); and (3) requests for identification of any apprenticeship programs that OATELS contends CDIR and/or CAC denied on the basis of the needs test (section 3075(b) of the California Labor Code) or in violation of federal regulations (29 C.F.R., part 29) (Interrogatories Nos. 17-20).

For the reasons explained more fully below, CAC's motion to compel further responses to all three groups of interrogatories should be denied. OATELS should not be compelled to disclose Secretarial communications on the concurrent registration decision and other post-derecognition-decision California apprenticeship matters because these matters are not before the ALJ, because they are irrelevant to this proceeding, and because the Administrative Review Board, not the Secretary, is the final agency decision-maker on the derecognition case. Furthermore, even if CAC could overcome these jurisdictional and relevance objections, it has failed to make the strong showing of misconduct that is required for discovery seeking an agency's internal communications.

Similarly, OATELS should not be compelled to provide further identification of its reasons for the contested derecognition because OATELS has already cited its April 8, 2003 derecognition letter, which identifies, on its face, OATELS' two reasons for derecognizing CDIR

and CAC. CAC has not requested information beyond such identification and is not, in any case, entitled to discovery of OATELS' legal theories.

Finally, OATELS should not be compelled to disclose now whether it contends that CDIR and/or CAC have denied any programs on the grounds in question because such a unilateral disclosure would be improper in light of the February 17, 2004 telephone conference date that the ALJ has set for the parties' pre-trial exchange of issues and stipulations. Such disclosure should also not be compelled because OATELS has already given as complete answers to the disputed interrogatories as its present knowledge permits.

ARGUMENT

With two exceptions, CAC's motion does not accurately represent the order in which the two parties actually exchanged arguments during their attempts at informal resolution of this dispute.[1] Instead, CAC generally inverts the order of CAC's discussions and OATELS' surreplies so that it appears from the motion that CAC's discussions are replies to OATELS's surreplies when, in fact, OATELS' surreplies are responses to CAC's discussions. The effect of this inversion is to make it unclear what arguments OATELS' surreplies answer. Moreover, CAC's reversal of the order of the arguments creates the false impression that CAC's discussions are new arguments when, in fact, with one two-sentence exception, see CAC's Motion at 7, ll. 23-25, CAC's discussions are merely recycled old arguments that OATELS' surreplies already answered.

Furthermore, CAC's motion does not provide the source documents in which the adversaries' arguments were presented, making it impossible for the ALJ to verify what the two

[1] CAC's motion correctly represents the order of the parties' exchanges on Interrogatories Nos. 19-20, see CAC's Motion at 15-16, but not of any of the parties' other exchanges on the other disputed interrogatories.

parties actually said or the order in which their exchanges actually occurred. To remedy these misrepresentations and omissions in CAC's motion, OATELS has attached the source documents and reconstructs below the actual order of the parties' exchanges on each disputed interrogatory.

Each of the above three groups of CAC interrogatories is presented below, followed by the OATELS response or objection, CAC's reply, OATELS' surreply, and any new argument CAC made in its motion to compel. The discussion of each group of interrogatories concludes with OATELS' opposition to CAC's motion to compel each further response.

I. The Interrogatories Requesting Disclosure of Secretarial Communications (Interrogatory Nos. 2-13)

A. Interrogatories, Responses and Informal Exchanges

INTERROGATORY NO. 2[2]

State whether prior to August 4, 2003 OATELS informed the SECRETARY, directly or indirectly, of OATELS' intention to issue the DECISION.

OBJECTION[3]

We object to this interrogatory on the following grounds:

(1) The interrogatory is irrelevant because OATELS' exercise of its authority to conduct concurrent registration is not at issue in this litigation, and the administrative law judge ("ALJ") has no jurisdiction over any challenge to OATELS' exercise of its registration authority. OATELS exercised concurrent authority to register apprentices in California for federal purposes to reduce the time to process a registration application from the one-and-a-half to three years California

[2] See CAC's First Set of Interrogatories at 4 (September 19, 2003), attached as "Appendix A." All subsequent quotations of interrogatories are from this document.

[3] See Prosecuting Party's Responses to Respondent CAC's First Set of Interrogatories and Requests for Production of Documents at 2-4 (Oct. 27, 2003), attached as "Appendix B." All subsequent quotations of objections are from this document

was taking to no more than a few months for federal registration. OATELS initiated derecognition proceedings, by contrast, to strip the California state apprenticeship council of its delegated federal registration authority because the State passed a restrictive apprenticeship law without prior OATELS approval. Derecognition would take away California's federal registration authority, whereas concurrent registration simply allows DOL to register apprentice programs for federal purposes alongside the State. Thus, the concurrent registration and derecognition decisions are based on unrelated grounds and provide different remedies to different problems. Accordingly, discussions about the concurrent registration have no bearing on the disputed derecognition decision here. Therefore, this interrogatory is not reasonably calculated to lead to discovery of admissible evidence.

(2) The interrogatory is also irrelevant because the Secretary is not the final agency decision-maker on the derecognition case, and therefore no communications with her on any topic, however related to derecognition, could have possibly been improper ex parte communications about this case. Secretary's Order 2-96 (May 3, 1996) delegated the Secretary's authority to decide derecognition appeals under the National Apprenticeship Act to DOL's Administrative Review Board ("ARB"). Id., § 4c(26), 61 Fed. Reg. 19,978, 19,978 (1996). Thus, the ARB, not the Secretary, will issue the final agency decision on any appeal of the ALJ's decision on the derecognition case, and any communications that OATELS or its attorneys had with the Secretary could not possibly have been ex parte contacts with the final agency decision-maker here. Accordingly, communications with the Secretary, on concurrent registration or any other subject, are completely irrelevant to this proceeding, and cannot taint the agency's prospective final decision on the derecognition case. Therefore, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

(3) The interrogatory is also objectionable because it attempts to probe DOL's deliberative processes for evidence of impropriety. Discovery of such internal deliberations and communications is not permitted absent a strong showing of agency bad faith or improper behavior. Overton Park v. Volpe, 401 U.S. 402, 420(1971); Community for Creative Non-Violence v. Lujan, 908 F.2d 922, 997-98 (D.C. Cir. 1990). Merely alleging wrongdoing without making the required showing first does not entitle CAC to request discovery to see whether DOL's conduct really was improper. See Apex Constr. Co. v. United States, 719 F. Supp. 1144, 1147 (D. Mass. 1989); Warren Bank v. Saxon, 263 F. Supp. 34, 39 (E.D. Mich. 1966), aff'd sub nom. Warren v. Camp, 396 F.2d 52 (6th Cir. 1968). CAC has made no such showing here, and we categorically deny that any improper ex parte communications, or any other misconduct, occurred.

CAC's REPLY[4]

1. The first objection assumes the absence of any connection between this proceeding and OATELS' decision to register apprentices in California for federal purposes. However, the stated rational [sic] for the registration decision is the alleged delays in CAC/DIR's registration of apprentices. These alleged delays have been the subject of extensive discovery by OATELS. It therefore appears that the Secretary has prejudged one of the issues in this proceeding. CAC is entitled to know whether the Secretary was influenced by improper ex parte communications.

OATELS cannot argue that the registration decision is unrelated to this proceeding if OATELS' discovery in this proceeding is directed to the facts that justify the registration decision.

2. The second objection assumes that the Secretary is not the final decision maker on this proceeding because the Secretary has delegated her authority to decide derecognition appeals to the

[4] See letter from Julian O. Standen, Esq., CAC's Counsel, to Scott Glabman, Esq., OATELS' Counsel, 2nd to 3rd unnumbered pages (Nov. 10, 2003), attached as "Appendix C." The title of the headings of CAC's remarks has been changed from "Discussion" to "Reply" throughout. All subsequent quotations of replies are from this document

Administrative Review Board ("ARB"). However, as Judge Vittone indicated in the November telephone status conference, it is not certain that the delegation covers this proceeding, and it also is not certain that the revocation is non-revocable. If there is any possibility that the Secretary has or will assume decision making authority over this proceeding, OATELS' Response has no validity.

Furthermore, even if the Secretary has made an irrevocable delegation, the Secretary retains ultimate decision-making authority because it is the Secretary, and not ARB, who will decide whether to defend the decision if there is an appeal to the courts.

3. The third objection claims that the interrogatory seeks discovery into "DOL's deliberative processes." Since the Secretary of Labor is the head of the Department of Labor, the response is an admission that the Secretary already has deliberated about the issues raised in this proceeding. The APA prohibits the Secretary from deliberations about this proceeding based on ex parte communications. CAC therefore is entitled to know whether such improper ex parte communications exist.

It is surprising that OATELS would claim that the Secretary has no involvement in this proceeding and then make the additional claim that the discovery is improper because it seeks to disclose the Secretary's deliberations about this proceeding.

OATELS' SURREPLY[5]

1. CAC's reply to the first objection misconceives OATELS' stated basis for the concurrent registration decision and OATELS' unrelated basis for requesting discovery into delays in CDIR's processing of registration applications. OATELS decided to exercise concurrent registration jurisdiction in California because the State's own regulations estimate that it takes one-and-a-half

[5] See letter from Mr. Glabman to Mr. Standen at 5-8 (Jan. 7, 2004), attached as "Appendix D." All subsequent quotations of surreplies are from this document

to three years to process a registration application, see Cal. Code Regs., tit. 8, § 212.2(j), a period that federal registration will reduce to no more than a few months. Unlike the derecognition decision, the concurrent registration decision has nothing to do with California's restrictive treatment of apprenticeship programs, but is based on the unacceptably long time the State was taking to process registration applications.

By contrast, OATELS' discovery into CDIR's processing delays is designed to determine whether there is a pattern or practice of delay in processing unilateral, but not joint, program registration applications. Such disparate treatment, if it has occurred, would be directly related to the restrictive apprenticeship statute, section 3075(b) of the California Labor Code, on which the derecognition decision was based, but would not further support the concurrent registration decision, which was based on processing time. Conversely, if CDIR's processing delays have affected unilateral and joint programs equally, or have resulted simply from lack of staff or heavy work loads, the delays would be irrelevant to the derecognition decision but would still support the concurrent registration decision.

Thus, CAC's reply is based on the erroneous premise that OATELS' discovery in the derecognition proceeding concerns the facts that support the concurrent registration decision.

2. As a threshold matter, CAC's first reply to the second objection lacks merit because the reply erroneously assumes that the APA restrictions on ex parte contacts in administrative adjudications apply here. In fact, these APA restrictions apply only to administrative adjudications "required by statute to be determined on the record after opportunity for an agency hearing . . . ." See 5 U.S.C. § 554(a); see also § 554(d) (setting out restrictions on ex parte contacts). Since the hearing requirement here was established by regulation, see 29 C.F.R. § 29.13(c)(3), not by statute, the APA restrictions do not apply. Even if the APA restrictions did apply here, CAC's reply is still

unwarranted because Secretary's Order 1-2002 delegated to the Administrative Review Board ("ARB") the Secretary's authority to issue final agency decisions on administrative appeals of ALJ decisions under the National Apprenticeship Act and its implementing regulations. See Secretary's Order 1-2002, § 4c(25), 67 Fed. Reg. 64,272, 64,272 (2002). Thus, under existing law, there is no possibility that the Secretary will make the final agency decision in this proceeding. CAC has not suggested any reason to think that the existing law will be changed in any way that would make this interrogatory relevant.

CAC's second reply to the second objection, that the Secretary is the ultimate decision-maker here because she will decide whether to defend an appeal of the ARB's decision to federal court, confuses what would be the agency's final action here, the ARB's final order, with the agency's post-adjudicative litigation response to an appeal of that final order. Even assuming that the APA's restrictions on ex parte contacts with the final agency decision-maker apply here, those restrictions apply to contacts with the ARB, which will make the final agency decision here, and not to the Secretary, whose only role here is that of a potential party in a prospective CDIR and/or CAC appeal of the ARB's final order to federal court. If such an appeal is filed, DOL would no longer be acting as an administrative adjudicator but as a respondent, defending its final agency action in federal court. Any decision about this case that the Secretary makes at the judicial review stage would not be a "final agency action" within the meaning of the Administrative Procedure Act, see 5 U.S.C. § 704,[6] but only a litigation decision made in the course of a CDIR and/or CAC appeal of the final agency action. Thus, the theoretical possibility that the Secretary might decide, after an appeal of a future ARB decision on this case, not to

[6] See also Capital Network Sys. v. FCC, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (agency action final if it represents a terminal, complete resolution of the case before the agency and determines rights or obligations, or has some legal consequence).

defend the ARB's decision in federal court does not make her the final agency decision-maker here, or make her subject to the APA ban on ex parte contacts with that decision-maker.

Even if the Secretary's decision whether to defend the ARB's final order on appeal could be construed as being, in some sense, the agency's final action, the APA doctrine of no ex parte contacts with the final agency decision-maker would still not apply to the Secretary in this proceeding. The ban would not apply here because no contacts between OATELS and/or OATELS' lawyers and the Secretary here could taint a later Secretarial decision whether to defend the ARB's final order since the Secretary has every right to consult her lawyers and the program agency concerned in making that litigation decision. Indeed, making such a decision without such consultations would be irresponsible, if not nonfeasant. Furthermore, such consultations, like any similar communications that might have occurred during this proceeding, would very likely be protected by the deliberative process and/or attorney-client privileges.

In any case, even if the APA ban on ex parte contacts did apply to the Secretary in this proceeding (on the theory that the Secretary would later decide whether to defend the ARB's final order on appeal), such contacts could not prejudice CAC because the Secretary cannot appeal DOL's final agency actions. Thus, the only ARB decision here that the Secretary could decide not to defend would be a decision in OATELS' favor, and such a Secretarial action would benefit, not harm, CAC.

3. CAC's reply to the third objection mistakenly assumes that the objection characterizes the Secretary's deliberations when, in fact, the objection neither admits nor denies that any such deliberations occurred, but characterizes only what the interrogatory seeks. CAC's reply is also based on the erroneous premise that any deliberations the Secretary might have made about the concurrent registration decision are relevant to this derecognition proceeding. As explained in

surreply 1 above, however, this premise conflates the basis of the concurrent registration decision (that CDIR has taken an unacceptably long time to process registration applications) with the unrelated question that OATELS has sought to answer through discovery (whether CDIR has delayed processing unilateral, but not joint, program applications). In any event, CAC's reply also ignores the fact that CAC has not made the strong showing of agency misconduct that is the prerequisite for any discovery that seeks an agency's internal communications or other evidence of its deliberative processes. CAC has only speculated about the possibility of improper ex parte contacts with the Secretary, and discovery into the above matters is not permitted on speculation.

CAC'S MOTION TO COMPEL[7]

Lastly, OATELS claims that the registration decision was based solely on California's alleged delays in processing applications for new programs. However, CAC is not required to accept this claim on faith and instead is entitled to test its veracity through discovery.

INTERROGATORY NO. 3[8]

If your response to the previous interrogatory is anything other than an unqualified negative, explain the response.

INTERROGATORY NO. 12

Describe any involvement of the SECRETARY in the deliberations which resulted in the issuance of the DECISION.

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[7] See CAC's Motion to Compel at 7, ll. 23-25. CAC's motion grafts the two textual sentences immediately below this heading onto CAC's November 10 reply above, see supra, pp. 6-7, and presents the expanded reply as a discussion of OATELS' objections and surreplies.

[8] Interrogatory Nos. 3, 12 and 13 are grouped together because the parties gave the same responses to each of them.

INTERROGATORY NO. 13

IDENTIFY each DOCUMENT that constitutes or discusses each fact stated in your response to the previous interrogatory.

OBJECTIONS TO INTERROGATORY NOS. 3, 12-13

Same as the objections to Interrogatory No. 2.

CAC's REPLY TO INTERROGATORY NOS. 3, 12-13

See discussion of response to Interrogatory No. 2.

OATELS' SURREPLY TO INTERROGATORY NOS. 3, 12-13

Same as the surreply to Interrogatory No. 2.

CAC'S MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORY NOS. 3, 12-13

[copies CAC's reply above and presents no new material]

INTERROGATORY NO. 4

IDENTIFY each COMMUNICATION from OATELS to the SECRETARY RELATING TO apprenticeship in California that was made subsequent to May 11, 2002.

OBJECTION

In addition to all of our objections to Interrogatory No. 2, which we incorporate by reference, we also object to the request for all communications on California apprenticeship after May 11, 2002 as irrelevant. Since the derecognition decision was issued on May 10, 2002, no post-decisional communication could have had any possible influence on that decision or any conceivable bearing on this case. Accordingly, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence, and CAC has made no showing of any need to require DOL to search for and identify responsive communications.

CAC's REPLY

See discussion of response to Interrogatory No. 2.

OATELS' additional objection ignores the possibility that ex parte communications after May 10, 2002 will lead the Secretary to prejudge the issues in this proceeding. Such communications are discoverable because they are prohibited by the APA.

OATELS' SURREPLY

Same as the surreply to Interrogatory No. 2.

CAC's reply to OATELS' additional objection is without merit because the Secretary lacks authority to judge the issues here. Further, as discussed in our objection (3) to Interrogatory No. 2, an agency's internal communications are not discoverable merely because the requester thinks that they may have violated the APA, but only if the requester makes a strong showing that the alleged misconduct actually occurred. CAC has not made the required showing here.

CAC'S MOTION TO COMPEL

[copies CAC's reply above and presents no new material]

INTERROGATORY NO. 5[9]

IDENTIFY each DOCUMENT RELATING TO a COMMUNICATION identified in your response to the previous interrogatory.

INTERROGATORY NO. 6

IDENTIFY each COMMUNICATION from OATELS' ATTORNEYS to the SECRETARY RELATING TO apprenticeship in California that was made subsequent to May 11, 2002.

[9] Interrogatory Nos. 5-11 are grouped together because the parties gave the same responses to each of them.

INTERROGATORY NO. 7

IDENTIFY each DOCUMENT RELATING TO a COMMUNICATION identified in your response to the previous interrogatory.

INTERROGATORY NO. 8

IDENTIFY each COMMUNICATION from the SECRETARY to OATELS RELATING TO apprenticeship in California that was made subsequent to May 11, 2002.

INTERROGATORY NO. 9

IDENTIFY each DOCUMENT RELATING TO a COMMUNICATION identified in your response to the previous interrogatory.

INTERROGATORY NO. 10

IDENTIFY each COMMUNICATION from the SECRETARY to OATELS' ATTORNEYS RELATING TO apprenticeship in California that was made subsequent to May 11, 2002.

INTERROGATORY NO. 11

IDENTIFY each DOCUMENT RELATING TO a COMMUNICATION identified in your response to the previous interrogatory.

OBJECTIONS TO INTERROGATORY NOS. 5-11

Same as the objections to Interrogatory No. 4.

CAC's REPLY TO INTERROGATORY NOS. 5-11

See discussion of response to Interrogatory No. 4.

OATELS' SURREPLY TO INTERROGATORY NOS. 5-11

Same as the surreply to Interrogatory No. 4.

CAC'S MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORY NOS. 5-11

[copies CAC's reply above and presents no new material]

B. OATELS' Opposition

Disclosure of Secretarial Communications on the Concurrent Registration Decision Should not Be Compelled Because That Decision is not Before the ALJ and Is Irrelevant to This Proceeding, and Because the Secretary Is not the Final Agency Decision-Maker Here.

As discussed above, CAC seeks discovery of Secretarial communications on DOL's August 2003 decision to register apprenticeship programs in California for federal purposes alongside the State. That decision was based on different grounds from DOL's derecognition decision, does not affect the outcome of any issues in this proceeding, and is not before the ALJ. See supra, pp. 4-5, 7-8. Indeed, the ALJ lacks jurisdiction to affirm, reverse or modify the concurrent registration decision because there is no administrative procedure for appealing it.

Accordingly, CAC's interrogatories on Secretarial communications on the concurrent registration decision are outside the scope of discovery. Discoverable material must be "relevant to the subject matter involved in the proceeding," and "reasonably calculated to lead to the discovery of admissible evidence." 29 C.F.R. § 18.14(a)-(b); accord Fed. R. Civ. P. 26(b)(1). That is, the issue or theory on which the information bears must actually be involved in the pending action. Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1326-27 (Fed. Cir. 1990). Material about the concurrent registration decision is not discoverable here because that decision is not involved in this action.

In the sole new argument in its motion to compel, CAC attempts to establish the relevance of its interrogatories on the concurrent registration decision by doubting OATELS' stated grounds for that decision and asserting that discovery is necessary to verify them. See CAC's Motion at 7, quoted supra, p. 11. As the Federal Circuit has held, however, "requested

information is not relevant to "subject matter involved' in the pending action if the inquiry is based on the party's mere suspicion or speculation." Kane, 894 F.2d at 1326. "The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim." Id. at 1327 (emphasis in original); accord Netto v. AMTRAK, 863 F.2d 1210, 1216 (5th Cir. 1989); MacKnight v. Leonard Morse Hp., 828 F.2d 48, 52 (1st Cir. 1987). The factual basis for the claim must be shown before discovery will be allowed, Milazzo v. Sentry Ins., 856 F.2d 321, 322 (1st Cir. 1988), and this threshold showing must link the information to the claim. PMC, Inc. v. Ferro Corp., 131 F.R.D. 184, 188 (C.D. Cal. 1990). CAC has made no such showing here, and cannot establish the relevance of its requests on the basis of its unfounded suspicion and speculation.

As also discussed above, Secretarial communications have no conceivable relevance here because, contrary to CAC's assumption, only the Administrative Review Board, not the Secretary, has authority to make the final agency decision on any administrative appeal of an ALJ decision on this case. See supra, pp. 8-10. Thus, contrary to CAC's unfounded speculation, no communications that OATELS or its attorneys may have had with the Secretary could possibly have been improper ex parte contacts with the final agency decision-maker here.

Finally, even if CAC could overcome the above jurisdictional and relevance objections, the disputed interrogatories are still objectionable because CAC has failed to make the required strong showing of agency misconduct required for discovery seeking an agency's internal communications. See supra, p. 6. Since CAC is not entitled to such discovery absent such a showing, disclosure of the requested Secretarial communications should not be compelled.

II. The Interrogatory Requesting Identification of OATELS' Reasons for Derecognizing CAC (Interrogatory No. 16)

A. Interrogatory, Response and Informal Exchanges

INTERROGATORY NO. 16

IDENTIFY each "reason", as you have defined that word in your response to the previous interrogatory, that you contend warrants the derecognition of the Council and/or DIR pursuant to 29 C.F.R. 29.

RESPONSE

Not applicable.

CAC's REPLY

See discussion of response to Interrogatory No. 15.

OATELS' SURREPLY

The two reasons in question are stated in Administrator's Swoope's April 8, 2003 letter to Mr. Kay. See id. at 1, para. 2.

CAC'S MOTION TO COMPEL

[copies CAC's reply above and presents no new material]

B. OATELS' Opposition

Further Identification of OATELS' Reasons for Derecognizing CAC Should not Be Compelled Because OATELS Has Already Sufficiently Identified Them and Ordering Further Disclosure Would Improperly Reveal OATELS' Legal Theories.

OATELS has already sufficiently identified its reasons for derecognizing CAC by citing the document that explicitly states these reasons, OATELS' April 8, 2003 letter to CAC, attached as "Appendix E." See Mr. Glabman's letter to Mr. Standen at 16, Interrogatory No. 16, OATELS' Surreply, App. D. The applicable portion of the cited April 8 letter says:

> We are derecognizing CAC for two reasons: (1) because CAC is operating under a state law, California Labor Code section 3075(b), that violates the federal apprenticeship regulations at 29 C.F.R. § 29.1. Section 3075(b) violates these regulations by setting "need" criteria for the approval of new apprenticeship programs in the building and construction trades and crafts that limit, rather than promote, apprenticeship opportunities; and (2) because CAC has failed to comply with the federal regulations at 29 C.F.R. § 29.12(a) by not seeking prior approval of section 3075(b) from us. For your guidance, we are enclosing Bureau of Apprenticeship and Training Circular 88-5, which interprets this regulatory "prior approval" requirement.

OATELS' Letter to CAC at 1, App. E.

CAC's only reply to OATELS' citation of this letter was to cite CAC's discussion of OATELS' response to Interrogatory No. 15. See CAC's Motion to Compel at 14. That discussion, however, simply corrected CAC's previous misstatement of the date of the letter in question and asked OATELS to respond to the original interrogatory as if it stated the correct date. See Mr. Standen's Letter to Mr. Glabman, 6th unnumbered page, Interrogatory No. 15, Discussion, App. C. OATELS did so in its surreply, see Mr. Glabman's letter to Mr. Standen at 15, App. D, and CAC dropped its objection to OATELS' response to Interrogatory No. 15. In its motion to compel, CAC evidently forgot that its cited discussion of Interrogatory No. had been mooted by OATELS' surreply and gave no other objection to the surreply. Therefore, since OATELS' surreply cited the letter that explicitly identifies OATELS' reasons for derecognizing CAC, and CAC's only objection to this surreply is now moot, no further identification of these reasons should be compelled.

Furthermore, CAC has not requested any further identification of OATELS' reasons for derecognition, and even if CAC had, the request would be outside the scope of discovery because the request would concern OATELS' legal theories of derecognition. Discovery is limited to inquiries into relevant matters of fact and applications of law to fact. See 29 C.F.R. §§ 18.14(a), 18.20(a); accord Fed. R. Civ. P. 26(b)(1), 36(a); Hickman v. Taylor, 329 U.S. 495, 507

(1947). While CAC is entitled to, and received, a statement of the basis of OATELS' derecognition decision, CAC has no right to learn in advance what legal theories and arguments OATELS will use to support that decision. See Hickman, 329 U.S. at 516 ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary").

Discovery of materials another party has prepared in anticipation of, or for, a hearing is permitted only on a showing that one has substantial need of the materials to prepare one's case. See 29 C.F.R. § 18.14(c); Fed. R. Civ. P. 26(b)(3). CAC has made no such showing here, and, even if CAC had, the discovery rules instruct the ALJ, even after such a showing has been made, to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding." 29 C.F.R. § 18.14(c); accord Fed. R. Civ. P. 26(b)(3). Thus, any CAC request for further identification of OATELS' reasons for derecognition should be rejected as an improper request for advance disclosure of OATELS' legal theories.

III. The Interrogatories Requesting Disclosure of Any Apprenticeship Programs That OATELS Contends Were Denied on the Basis of the Needs Test or in Violation of Federal Regulations (Interrogatory Nos. 17-20)

A. Interrogatories, Responses and Informal Exchanges

INTERROGATORY NO. 17[10]

IDENTIFY each apprenticeship training program that you contend submitted an application for approval of a new program or approval of expansion of an existing program to train apprentices that was denied by the COUNCIL pursuant to California Labor Code section 3075.

[10] Interrogatory Nos. 17 and 18 are grouped together because the parties gave the same response to each of them.

INTERROGATORY NO. 18

IDENTIFY each apprenticeship training program that you contend submitted an application for approval of a new program or approval of expansion of an existing program to train apprentices that was denied by DIR pursuant to California Labor Code section 3075.

RESPONSE TO INTERROGATORY NOS. 17-18

We have asked CDIR and CAC this very question in discovery and have requested the material that would enable us to answer this interrogatory, but we cannot do so until we have received, and have had a chance to review, all of the requested material.

CAC's REPLY TO INTERROGATORY NOS. 17-18

The interrogatory asks whether OATELS has any knowledge as of the date of its responses of program applications that were denied pursuant to Labor Code section 3075. If OATELS does not have any current knowledge of any such program, it must say so. CAC is entitled to know whether OATELS had any actual knowledge of such programs prior to discovery in this proceeding. OATELS may reserve the right to supplement its responses when it has completed its review of the discovery it has received from CDIR.

OATELS' SURREPLY TO INTERROGATORY NOS. 17-18

OATELS does not know now whether any applications have been denied on the basis of section 3075, did not know the answer to this question before discovery in this proceeding, and will not know the answer until the thousands of pages of program files recently received from CDIR have been completely reviewed. Since one of the goals of our discovery is to learn the answer to this question, we cannot be required to answer it until our discovery is complete.

CAC'S MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORY NOS. 17-18

[copies CAC's reply above and presents no new material]

INTERROGATORY NO. 19[11]

IDENTIFY each apprenticeship training program that you contend submitted an application for approval of a new program or approval of expansion of an existing program to train apprentices that was denied by the COUNCIL on grounds that violate 29 C.F.R. part 29.

INTERROGATORY NO. 20

IDENTIFY each apprenticeship training program that you contend submitted an application for approval of a new program or approval of expansion of an existing program to train apprentices that was denied by DIR on grounds that violate 29 C.F.R. part 29.

RESPONSE TO INTERROGATORY NOS. 19-20

Same as response to Interrogatory No. 17.

CAC's REPLY TO INTERROGATORY NOS. 19-20

The interrogatory asks whether OATELS has any knowledge as of the date of its responses of program applications that were denied on grounds that violate 29 C.F.R. If OATELS does not have any current knowledge of any such program, it must say so. CAC is entitled to know whether OATELS had any actual knowledge of such programs prior to discovery in this proceeding. OATELS may reserve the right to supplement its responses when it has completed its review of the discovery it has received from CDIR.

[11] Interrogatory Nos. 19 and 20 are grouped together because the parties gave the same response to each of them.

OATELS' SURREPLY TO INTERROGATORY NOS. 19-20

OATELS does not know now whether any applications have been denied on grounds that violate 29 C.F.R., part 29, did not know the answer to this question before discovery in this proceeding, and will not know the answer until the thousands of pages of program files recently received from CDIR have been completely reviewed. Since one of the goals of our discovery is to learn the answer to this question, we cannot be required to answer it until our discovery is complete.

CAC'S MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORY NOS. 19-20

[copies CAC's reply above and presents no response to OATELS' surreply]

B. OATELS' Opposition

Disclosure of Any Programs That OATELS Contends CDIR and/or CAC Denied on the Specified Grounds Should not Be Compelled Before the Parties' Scheduled Pre-hearing Telephone Conference.

Without offering any reciprocal disclosure of its own trial contentions, CAC now seeks unilateral disclosure of OATELS' trial positions before the February 17, 2004 telephone conference date that the ALJ has set for the parties' discussion of pre-hearing issues and stipulations.[12] Compelling such a premature disclosure would not only be unfairly one-sided, but would also frustrate the purpose of the ALJ's November 25, 2003 order. That order gave OATELS until January 12, 2004 to review CDIR's and CAC's documents and determine whether any additional discovery was required. ALJ's Order at 1. The order also granted the parties an additional five weeks after the January 12 cut-off date to answer any additional discovery requests, assess the evidence, and formulate trial positions before discussing pre-hearing issues

[12] The ALJ's order actually set the date of February 16, a federal holiday, for the telephone conference. See Order Granting Extension ("ALJ's Order") at 1 (Nov. 25, 2003). Accordingly, we construe the conference date as February 17, the next business day.

and stipulations at the required February 17 telephone conference. Ibid. CAC's motion would short-circuit this process, improperly forcing OATELS to declare its trial positions before it has time to assess all of the evidence. For these reasons alone, CAC's request to compel disclosure of any programs that OATELS contends CDIR and/or CAC denied on the specified grounds should be denied.

Furthermore, OATELS has already admitted, in its January 20, 2004 responses to CDIR's similar discovery requests, which responses were served on CAC, that, OATELS has not yet found any denials based on section 3075(b) of the California Labor Code in CDIR's program files See Prosecuting Party's Responses to Respondent CDIR's First Set of Requests for Admissions at 2-3 (Jan. 20, 2004), attached as "Appendix F." OATELS also pointed out in those responses that it could not say whether there were no such denials because it does not know whether CDIR's files are complete. Ibid. OATELS admits further that it has not yet found any denials in violation of 29 C.F.R., part 29 in the CDIR files, subject to the same qualification that OATELS does not know whether the CDIR records on which this conclusion is based are complete. Thus, OATELS has already given as complete answers to the disputed interrogatories as its present knowledge permits. Moreover, since OATELS has also already answered CAC's remaining questions about OATELS' pre-discovery knowledge of these matters, see supra, p. 22, OATELS' responses to these interrogatories are sufficient. Accordingly, no further responses should be compelled.

CONCLUSION

For these reasons, OATELS respectfully asks that the ALJ deny CAC's motion to compel in its entirety.

Respectfully submitted,

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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.	)	Case Nos. 2002-CCP-1, 2003-CCP-1
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,	)	
Respondent,	)	
and	)	
CALIFORNIA APPRENTICESHIP COUNCIL,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January 2004, I served a copy of the preceding Prosecuting Party's Opposition to Respondent California Apprenticeship Council's Motion to Compel, by electronic mail and Federal Express, on the following:

John M. Rea, Esq.
Fred D. Lonsdale, Esq.
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I also certify that I served a copy of the same document, by facsimile transmission, on Mr. Rea, but not, at his request, on Mr. Standen.

STEPHEN R. JONES
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SCOTT GLABMAN
Senior Appellate Attorney